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CONVEYANCER'S NOTEBOOK

STAMP DUTY ON APPROPRIATION OF THE MATRIMONIAL HOME

On page 526 of Volume 17 we published a precedent of a form of appropriation of the matrimonial home to the widow of an intestate. The draftsman took the view that stamp duty would be *ad valorem* on the ground that the statutory power of appropriation under paragraph 5 (2) of Schedule II to the Intestates' Estates Act, 1952, requires the consent of the spouse (see *Jopling* v. *C. I. R.* [1940] 2 K.B. 282). On the other hand, Mr. J. G. Monroe, in his articles on the Law of Stamp Duties (Vol. 17, p. 497), took the contrary view. A correspondent writes to say that he drew up an appropriation and the agreed value of the house was £1,700. When the instrument was first submitted to the Inland Revenue for adjudication they adjudicated the stamp duty *ad valorem* at £17. The correspondent appealed against this adjudication on the ground that there was no sale or bargain in the true meaning of the word and that the appropriation was pursuant to the statutory power. The administrators had no power to refuse to appropriate but could only contest the value of the property (*cf. Hudson (John) & Co., Ltd.* v. *Kirkness* [1954] 1 W.L.R. 40). In the light of these arguments the Inland Revenue reconsidered the stamp duty and reassessed the duty at 10s. The position is, therefore, that where there is an appropriation under a testamentary power and the consent of the beneficiary is not required no *ad valorem* duty is payable; nor is it payable where a widow exercises her statutory power on intestacy; but it is payable where the general statutory power of appropriation is exercised with the consent of the beneficiary.

Stamp Duty on Settlement of Partnership Share

On page 564 of Volume 16 we published a precedent of a deed of partnership between a father and son, a further share being held in trust for an infant son on his attaining the age of twenty-two years, the intention being that he should then be admitted a partner. A correspondent writes that recently he drew two partnership agreements following this precedent. In the first case, the partnership agreement was stamped 10s. without adjudication but, in the second case, the Stamp Duty Office asked for the instrument to be adjudicated and claimed *ad valorem* duty on the share held in trust for the infant son. The draftsman of the precedent takes the view that the declaration of trust of the share in favour of the infant son is to be regarded for stamp duty purposes as a voluntary conveyance and that *ad valorem* stamp duty was, therefore, properly claimed, but not on the value of the quarter share itself for the interest given to the infant son was contingent and, therefore, the duty should only have been calculated on the value of the contingent interest. The amount of duty can, in appropriate cases, apparently be reduced by the insertion of the usual certificate of value.

Furnished Houses (Rent Control) Act, 1946—Continuance

By the Expiring Laws Continuance Act, 1953, the Furnished Houses (Rent Control) Act, 1946, is continued in force until March 31, 1955.

Tax-free Annuities

Great difficulty is experienced in framing the requisite provision to enable a donor to give an annuity in such a manner and of such amount that the ultimate benefit from the annuity reaching the annuitant's hands, sometimes called his " spendable income," is of a certain and constant value. It is important, of course, that in achieving that result the cost to the donor should be the minimum and that both the donor's and the annuitant's income should attract the least possible tax. The difficulty is caused by the incidence of taxation, varying from year to year in its rates and in the reliefs allowed. To avoid these variations, and to make the parties concerned liable to a minimum of tax, it is necessary to harmonise the general rules of law relating to the construction of documents granting annuities with the charging clauses of the Income Tax Acts, and, at the same time, to keep a watchful eye on the provisions for the collection of tax.

In Volume 12 on p. 342 we published a precedent of a deed of covenant to pay an annuity which the draftsman considered at that time (June, 1948) came near to achieving the above object. Recent practice and a subsequent decision of the High Court on another covenant have shown this hope to be illusory, and it is the purpose of this note to explain the present effect of that precedent.

In *Re Pettit* [1922] 2 Ch. 765, Romer J. decided that, where a testator, by his will, gives an annuity of " £x free of income tax," the trustees' duty, in the first place, is to set aside in respect of the annuity such a sum as, after the deduction of tax thereon at the standard rate for the time being in force, would leave a clear sum of £x. Of this sum £x should then be paid to the annuitant, the remainder being deducted by the trustees on account of tax payable by the annuitant under Case III of Schedule D (Income Tax Act, 1952, ss. 122, 123). The deduction would be made either under sections 169 or 170 of the Income Tax Act, 1952 (the old All Schedules Rules 19 and 21), according to the nature of the fund out of which the trustees make the payment. The annuitant should then claim any reliefs to which he is entitled and, on receipt of the repayment, should pay back to the trustees such a proportion of the reliefs as the annuity bears to the total income of the annuitant. For the purpose of claiming the reliefs the annuitant's total income is to be increased by the gross sum paid, that is to say, the £x actually paid plus the tax deducted by the trustees (*I. R. C.* v. *Cook* [1946] A.C. 1). The repayment to the trustees is made without any deduction (*Re Eves* [1939] 1 Ch. 969) and does not affect the total income of the annuitant for the purpose of claiming his reliefs (*I. R. C.* v. *Cook, supra*). A full discussion of the " *Re Pettit* covenant " and its derivatives will be made in an article in a forthcoming issue, it being sufficient here to note that the sum repaid to the trustees is at present treated by the Revenue as net income of the trust for the year in which it is received.

An annuity given by will and expressed to be " a sum free of income tax " will therefore come very near to achieving the object set out in our first paragraph, but unfortunately such an annuity cannot be given by an agreement *inter vivos*. This is because section 506 (2) Income Tax Act, 1952 (the old All Schedules Rule 23 (2)) provides that any " agreement for payment of interest rent or other annual payment in full without allowing any " deduction of tax authorised by that Act to be made out of such payment " shall be void." Section 506 (2) does not affect annuities given by will, for the annuitant under a will takes his annuity not by

agreement but " from the bounty or forbearance of the testator " (*Festing* v. *Taylor* (1862) 3 B. & S. 217, at p. 235). The covenant we printed in Volume 12 was an attempt to gain all the benefits of a " *Re Pettit* annuity " for an annuity made by agreement *inter vivos*, and yet avoid section 506 (2). This we fear it has failed to achieve.

The precedent printed in Volume 12 contains first a covenant by the donor to pay to the beneficiary " such a weekly sum as, after deducting income tax at the standard rate thereon for the time being in force, shall amount to a net sum of £x." This, standing alone, is a covenant to pay a variable gross sum of £x grossed up at the standard rate. The donor would deduct tax at the standard rate from the gross sum, and pay the annuitant £x per week. The annuitant, having received the £x, would claim any reliefs on his total income (including the sum of £x grossed up at the standard rate) and any repayment he would keep (*Re Jones* [1933] Ch. 842). In clause 3 of the deed, however, the draftsman added an express covenant by the annuitant, in terms somewhat similar to the obligation imposed by law in the case of a " *Re Pettit* annuity," to refund to the donor the reliefs referable to the annuity. This express covenant causes a different proportion of the reliefs to be payable to the donor than does the " *Re Pettit* rule," but basically the direction is the same. However, from a taxation viewpoint, there is one essential difference : the annuitant, in paying over a proportion of the reliefs, is making annual payments taxable in the hands of the donor under Case III of Schedule D (Income Tax Act, 1952, ss. 122, 123), which tax the annuitant should deduct at source before payment over. The distinction between the two cases has been clarified by the decision in *I. R. C.* v. *Duncanson* [1949] 2 All E.R. 846, which shows that in a " *Re Pettit* case " the reliefs are never the property of the annuitant, and in paying them to the trustees the annuitant is merely returning to them what in effect amounts to an overpayment. Thus, as the Revenue have already claimed in at least one case, and in our opinion correctly claimed, by using an express covenant for repayment of a proportion of the annuitant's reliefs, that repayment is subject to deduction of tax by the annuitant. The gross amount of the repayment must in addition be added to the donor's total income for surtax purposes. The covenant we printed does not therefore achieve so good a result as the " *Re Pettit* variety " in that more tax is paid.

Unfortunately, there is a further difficulty in deciding the full effect of the precedent in Volume 12. Is the repayment by the

annuitant to the donor payable "wholly out of profits or gains brought into charge to tax," in which case the deduction by the annuitant will be made under Income Tax Act, 1952, s. 169 (the old All Schedules Rule 19), or is it not so payable, in which case the deduction will be made under Income Tax Act, 1952, s. 170 (the old All Schedules Rule 21)? If the former is the case, the annuitant will retain the tax deducted, but his reliefs for the year in which he makes the repayment will be restricted by the deduction from his total income of the gross amount of the repayment (Income Tax Act, 1952, s. 221). This would cause a violent fluctuation in the amount of the reliefs obtained, the amount of the repayment, and the ultimate benefit to the annuitant, from year to year. If the latter construction is correct the annuitant will account to the Revenue for the tax deducted, but his reliefs for the year in which he makes the repayment will not be altered. Our opinion is that the latter is the correct construction. The covenant is to repay the actual tax recovered from the Revenue (*viz.*, "such a portion of any income tax recoverable") which is not income of the annuitant in the year in which it is received. The other possible construction is that the annuitant is covenanting to pay out of his profits and gains brought into charge to tax a sum equal to the repayment due. This latter construction could be supported by a reference to sub-clause 2 of clause 3 of the precedent, which, for the purposes of the repayment covenant, deems the annuitant's reliefs "to accrue from day to day during the financial year in respect of which" the reliefs are claimable, but would be contrary to the actual wording of the covenant and would cause the repayment to be due before it is ascertainable.

To sum up, in the light of present practice, we must advise against the use of the precedent in Volume 12, at p. 342, as its full effect is uncertain, and in any case it does not achieve the object set out in note (*a*) on page 342, in that any repayment will be subject to both income tax and surtax. D. R. S.

Assignment by Mortgagee of Part of Property Comprised in a Lease

Note (*b*) on p. 580 of Volume 17 should not be taken to imply that where part only of the property comprised in a lease has been mortgaged, and the rent was not either apportioned in the mortgage or had been apportioned previously thereto, the mortgagee can sell and convey the head term. The note in Wolstenholme and Cherry's *Conveyancing Statutes*, 12th ed., p. 378, appears to go

too far in suggesting that a power of attorney to convey the head term is now never required since section 98 of the Law of Property Act, 1925, was amended so as to include equitable apportionments. Key and Elphinstone's *Precedents in Conveyancing*, 15th ed., Vol. I, pp. 403, 613, takes the view that in such a case the mortgagee can only convey the mortgage term where the mortgage contains no power of attorney. It seems clear that under section 190 (5) of the Law of Property Act, 1925, the mortgagee could not apportion the rent as he does not "retain" the residue of the property, though he could do so with the mortgagor's concurrence. This section, however, enables a mortgagee to whom the lease has been mortgaged to apportion the rent and sell the head term in separate parts of the property.

There is of course no question as to the validity of the precedent given on p. 580.

E. H. B.

PROVISION FOR THE WIDOW

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It is intended in this article to bring together a number of rules of law which have little in common except that they may be of importance in advising a client who wishes to make some provision for his widow and, while willing to make that provision by will or in any other way that may be suggested, desires information concerning the burden of estate duty and taxation. This article contains nothing new or spectacular, but it is hoped that it may be of use to practitioners to have the various rules set out together in a simple form. Of necessity the subject must be divided arbitrarily; it is proposed therefore to begin with problems which arise in drafting a will and then to pass on to methods of providing for the widow by other means.

Testamentary Provision

Immediate Legacy

Even though a will contains ample provision for a widow, she may often be short of money during the year following the death of her husband, unless the executors are willing to make payments to her in advance. It may be as well, therefore, to provide a pecuniary legacy to the widow of a sum large enough to meet her immediate needs, and to provide that it is to be paid in priority to all other dispositions contained in the will. The executors will then be justified in paying money to the widow as soon as ready money is to hand, provided the estate is solvent.

Life Interest

It is well known that an exemption from estate duty may be obtained by settling a life interest on the widow of the testator; if this is done, no estate duty is payable on the widow's death in respect of the settled property, provided duty has been paid in respect of that property on the husband's death. The manner in which this exemption arose is worth examining. The Finance Act, 1894, s. 5 (2), enacted that, once estate duty has been paid on any "settled property," no further estate duty should be payable in respect of that property, until the death of a person who was at the time of his death, or had been at any time during the continuance

of the settlement, " competent to dispose " of such property. Settled property did not altogether escape, however, since an additional duty called Settlement Estate Duty was payable out of such property. Now Settlement Estate Duty was abolished by the Finance Act, 1914, s. 14. The same Act also abolished the exemption from estate duty which the Act of 1894 had conferred on " settled property "; at the same time, however, it expressly retained the exemption in cases where estate duty on " settled property " had been paid upon the death of one party to a marriage, so far as concerned the payment of estate duty on the death of the other party to the marriage. It is this provision which confers exemption today. There are, therefore, three main requirements which must be fulfilled in order for the exemption to arise; a few words should be said on each of them.

(1) *Estate duty must have been paid on the death of the spouse who first dies, in this case the husband.* Thus no exemption may be obtained where the provision for the widow is made by a settlement which avoids estate duty on the husband's death.

(2) *The widow must not be " competent to dispose " of the property settled, either during her lifetime or at her death.* There are several points arising out of this. The writer remembers having seen the draft of a will, intended to provide for a widow and yet avoid estate duty on her death, which entirely defeated the object it set out to achieve, because it tried to give the widow a number of instalments of capital, in the event of the income being inadequate for her needs. It provided that the widow could demand to have the income made up to a certain sum every year, and on her so demanding the trustees were bound to comply; in consequence the widow was competent to dispose of almost the whole fund. Another important point is that the widow is competent to dispose of the settled fund if she has a general power of appointment in respect of it. This is expressly provided by the Finance Act, 1894, s. 22 (2) (a), which further provides that the expression " general power " includes every power or authority enabling the donee or other holder thereof to dispose of property as he thinks fit, whether exerciseable by instrument *inter vivos*, or by will, or both. It is settled that the definition includes a limited power which enables the donee to appoint to himself : *Re Penrose* [1933] Ch. 793. The most cautious course is therefore to give the widow a power limited to the issue of the marriage, or some other limited class of which she cannot possibly be a member, so that she will not be competent to dispose of the settled fund.

(3) *The property in respect of which the exemption arises must be "settled"; for this purpose the definition of "settlement" contained in the Settled Land Act*, 1882, *was imported into the Finance Act*, 1894, *by section* 22 (1) (i). Now, clearly, property settled on a widow for life with remainders over is within the definition. Suppose, however, that a testator does not give a life interest, but only an annuity; can there be said to be a settlement, so that no estate duty is payable on the annuitant's death? The answer to this question is that the mere gift of an annuity does not appear of itself to make a settlement so as to exempt the fund out of which it is payable from estate duty : see *Re Waller* [1916] 1 Ch. 153, 158; *Armstrong* v. *Estate Duty Commissioners* [1937] A.C. 885, 894; but see also *Re White* [1939] 1 Ch. 131. On the other hand, it is clearly established that there is "settled property," where the will contains a direction to the trustees to set aside a fund to answer the annuity, and the trustees have done so : *Att.-Gen.* v. *Owen* [1899] 2 Q.B. 253; *Att.-Gen.* v. *Campbell* [1902] 1 K.B. 113. The same is probably true if there is no direction but only a power, and the power is in fact exercised : *Re Waller*, *supra*.

Where, therefore, a testator particularly desires to bequeath an annuity to his widow, care should be taken to see that an express direction to appropriate a fund to answer the annuity is included in the will.

Life Interest Supplemented out of Capital

A situation which frequently arises is that the testator does not wish to give to his widow a large amount of capital, which will only bear estate duty on her death, and yet is either unwilling to tie up the whole of his property to provide her with a life-interest, or fears that the income he is able to settle on her may be inadequate. The obvious answer is, of course, to bequeath a life interest, but to direct the trustees to make it up out of capital to a stated annual sum. This may be obvious, but should be avoided, for its effects may be disastrous. The great disadvantage of a direction to supplement income out of capital is that the life-tenant becomes assessable to tax on the capital sums so paid. Although the sums are capital of the fund, they are income in the hands of the life-tenant.

There has in the past been a series of attempts to supplement the widow's income out of capital, without incurring the charge to tax on the capital so applied. One device was to give the trustees of the will a discretion to supplement the income out of capital if they thought fit, without placing any obligation on them

to do so. It appears to have been thought that, since the life-tenant had no right to demand the payments out of capital, they could not be assessed as income. This view was upset by a series of decisions which show, first, that recurring payments, even if made out of capital and of varying amounts, may be assessed as income under Case III of Schedule D (Income Tax Act, 1952, s. 123): *Moss Empires, Ltd.* v. *I. R. C.* [1937] A.C. 785; and secondly, that tax may still be charged even if the beneficiary has no right to be paid, but is forced to rely on the discretion of the trustees: *Lindus and Hortin* v. *I. R. C.* (1933) 17 T.C. 442.

It is clear, therefore, that any provision for supplementing income out of capital should be drafted with extreme care, if it is desired to avoid an additional burden of income tax. What is not clear, however, is the exact dividing-line between payments which are income and payments which are capital. In *Brodie* v. *I. R. C.* (1933) 17 T.C. 432, 439, the distinction was stated in the following terms:

> "If the capital belonged to the person receiving the sums —if he or she was beneficially entitled not only to the income but to the capital, then I should think that, when the payments were made, they ought to be regarded, and would be regarded, as payments out of capital, but where there is a right to the income, but the capital belongs to somebody else, then, if payments out of capital are made and made in such a form that they come into the hands of the beneficiaries as income, it seems to me that they are income and not the less income because the source from which they came was—in the hands, not of the person receiving them, but in the hands of somebody else—capital."

It appears therefore that the draftsman must take care that the payments made out of capital to the widow are of the nature of capital in her hands; there must be no suggestion of keeping up a certain income. This view is supported by the decision of the Court of Appeal in *Cunard's Trustees* v. *I. R. C.* (1946) 27 T.C. 122; [1946] 1 All E.R. 159. There was a gift in a will of the income of the testatrix's residuary estate to her sister, followed by a clause in these terms:

> "If in any year the income of my residuary estate shall not be sufficient to enable my sister to live at The Grove in the same degree of comfort as she now lives there with me, then I empower my trustees to apply such portion of the capital of my residuary estate by way of addition to the income as they in their absolute and uncontrolled discretion may think fit.

> Moreover, any capital so applied shall not be replaced out of the income of a subsequent year but shall be treated as an additional bequest to my sister."

The court held that any payments of capital made to the sister under this provision were for the purposes of the revenue law income, so as to bear income tax under Case III of Schedule D (Income Tax Act, 1952, s. 123), and consequently the trustees were bound to retain and account to the Crown for tax at the standard rate under rule 21 of the All Schedules Rules (Income Tax Act, 1952, s. 170). Lord Greene M.R. said :

> "That the payments were 'income' in Miss McPheeter's hands is, in my opinion, beyond dispute, and the fact that they were made out of capital is irrelevant. The payments were to be made 'by way of addition to the income' in order to enable Miss McPheeters to live in the same degree of comfort as before. The testatrix was in fact providing for a defined standard of life for her sister, that provision being made in part out of income and in part (at the discretion of the trustees) out of capital. The purpose was an income purpose and nothing else."

In view of the foregoing statements, it is submitted that any provision which states an annual sum to which the income is to be made up is likely to incur a heavy burden of tax. The same is true of any power expressed to be "to supplement income." A borderline case would be a power to pay to the life-tenant such sums as the trustees may think fit, provided that the total sums so paid in any one year shall not exceed the difference between the income produced by the trust fund and £——.

On the other hand, an unfettered discretion to the trustees to apply whatever sums of capital they think fit will be quite safe; unfortunately, it gives the trustees a most invidious task. Perhaps a more satisfactory device is to enumerate a list of events in the life of the widow, when she is likely to need extra money above the income bequeathed to her, and to empower the trustees to apply sums of capital for the widow's benefit on the happening of any such event; the events listed could well include loss of property by fire or theft, illness or injury, removal to a new house, the commencement of war, or serious litigation. It is considered that sums of capital so expended could not count as income of the widow, unless the list included a large number of items which would usually be met out of income, such as holidays or the upkeep of a motor-car.

As has been stated above, the widow should not be given the right to demand any payment, since it would make her "competent to dispose" of the property, whether she exercised the right or not, and would result in a charge to estate duty on her death.

Mention should be made here of a device which is sometimes useful, by which the trustees are empowered to lend sums of capital to the widow. The power may be made conditional on the income falling below a certain figure and may be limited to the difference between that figure and the income actually received. The widow may be allowed to repay at any time during her lifetime or may postpone payment until after her death. By this method the widow may be assured of an adequate income during her lifetime, subject to the recovery of part of that income from her estate after her death.

Annuity

Mention has already been made of the avoidance of a second burden of estate duty where an annuity is bequeathed to the widow. There are a few other points which should be borne in mind, which can usefully be collected here.

An annuity given "free of tax" does not always achieve the intended result; indeed, as a general rule it is as well to avoid using the words "free of tax" without adding something to explain what is meant; for, as a general rule, an annuity "free of tax" means one paid free of both income tax and surtax; the same is true of an annuity "free of income tax": *Re Crosse* [1920] 1 Ch. 240; *Re Reckitt* [1932] 2 Ch. 144. If it is desired to give the widow a sum clear of income tax, but not surtax, it is better to use the words "free of income tax but not surtax." Curiously enough, if the word "deduction" is used, only income tax is included; so that a gift of "£X a year after deduction of income tax" means an annuity of a "grossed-up" sum of £X, that is, the trustees pay the net sum of £X, having themselves deducted tax, but leave the annuitant to deal with her own surtax.

The most convenient form of a tax-free annuity is one expressed to be "£X free of income tax at the standard rate for the time being," or "such sum as, after deduction of income tax for the time being at the standard rate, shall leave in the hands of the annuitant the sum of £X." The draftsman should not usually employ other forms, except for special considerations. The reason for this, is that it is desirable to avoid the rule in *Re Pettit* [1922] Ch. 765, which, however just, is often awkward to apply. According

to this rule, where an annuity is given free of income tax, the additional sum thereby given over and above the stated amount of the annuity is given for the purpose of enabling the annuitant to meet her ultimate liability to tax, if any. Since tax, at the standard rate will have been deducted at source anyhow on the moneys actually paid to the annuitant, she is able to claim a repayment, if she in fact is not liable to pay income tax or is entitled to any reliefs. This repayment (or so much thereof as is attributable to the annuity) must be refunded to the trustees, and moreover the annuitant is bound to claim the repayment from the revenue authorities: *Re Kingcome* [1936] Ch. 566.

The rule in *Re Pettit* is well established, but for the sake of convenience it is usually preferable to exclude it by using the form of gift already indicated, thus allowing the annuitant to retain any repayments she may obtain from the revenue authorities.

It is unlikely that a testator would ever wish to give an annuity free of surtax; quite apart from the astronomical figures likely to be payable as the gross value of the annuity, the difficulties of working out the gross value are very great because the rate of surtax varies with the total income of the taxpayer: *Michelham's Trustees* v. *I. R. C.* (1930) 15 Tax Cas. 737. It would nearly always be better to give a rather larger annuity than to make it free of surtax.

To what extent, if at all, is it still useful to bequeath an annuity, or any other gift for that matter, "free of duty"? Although that phrase was more important before legacy and succession duty were abolished, it may still make a difference, since it may apply to estate duty. An annuity payable out of personalty does not prima facie bear its own estate duty, which is payable as a testamentary expense; consequently the words "free of duty" will generally be unnecessary. They may, however, be useful where it is feared that the estate duty payable as a testamentary expense will, together with the other debts and funeral and testamentary expenses, consume the residuary estate and cause the pecuniary gifts, including annuities, to abate; it appears that in such a case an annuity given "free of duty" will be exonerated at the cost of a gift not expressly freed from duty (see *Re Ridley* [1950] Ch. 415). There is another circumstance which makes it important to give an annuity "free of duty." That is, where the fund out of which it is payable consists wholly or partly of realty; for insofar as the annuity is charged on realty, it bears a proportionate part of the estate duty payable, unless expressly freed from such liability (see *Re Anstead* [1943] Ch. 161).

Non-Testamentary Provision

Annuities inter vivos

So far, the discussion has been confined to the drafting of wills: it is now proposed to mention shortly some types of disposition *inter vivos*, intended to provide for the widow of the disponor without incurring an unnecessary burden of tax and duty. Since annuities in wills have just been mentioned, it is convenient to continue with annuities created *inter vivos*. Two topics require discussion: the purchase of small annuities; and the purchase of annuities of any size.

As a general rule an annuity for the life of a widow or any other period, which is to arise on the death of her husband, will bear estate duty under the Finance Act, 1894, s. 2 (1) (d), and it makes no difference whether the annuity was purchased more than five years before death or not. An annuity is not, therefore, as a rule a profitable way of providing for a widow. But if an annuity of £52 or less is provided, it gains complete exemption from estate duty on the donor's death, even if he dies the day after providing it: Finance Act, 1894, s. 15 (1), as amended by the Finance Act, 1935, s. 33 (1). Although the exemption only applies to one annuity in favour of each person, and, if several are provided, to the first which does not exceed £52, if is usually worth obtaining. There is a less advantageous exemption which applies to annuities which, though more than £52, are not more than £104. This is conferred by the Finance Act, 1935, s. 33 (2), and its effect is set out in most of the textbooks on estate duty.

Perhaps the greatest advantage in the creation of small annuities is that the exemption which arises is valid even if the annuity is created within five years of death. The same consideration applies also where a large annuity is purchased in favour of the purchaser's widow, to arise on his death. Here, however, there is no complete exemption from estate duty; it is nevertheless the practice to treat such an annuity as exempt from aggregation with the other assets of the deceased, on the ground that it is property in which he "never had an interest." The proper way to obtain the exemption is by purchasing the annuity from an insurance company. The annuity should not be charged on property owned by the husband, nor on the business of which he is a partner, for if this is done, it is property in which he had an interest: *Att.-Gen.* v. *Wendt* (1895) 73 L.T. 255.

It should be pointed out that there is no direct authority for the view that an annuity purchased by the husband in favour of his wife from a third party is exempt from duty: it is based

on the idea that the money paid by the husband in respect of the annuity is a different thing from the annuity itself, and that, since the annuity is provided by the third party direct to the wife, the husband never has any interest in it, within the meaning of the Finance Act, 1894, s. 4, proviso.

Policies under Married Women's Property Act

It is well known that a policy under the Married Women's Property Act, 1882, may reduce the burden of estate duty, because the policy, being property in which the husband never had an interest, is not aggregated with the other property passing on the husband's death. A similar reasoning applies to these policies as to annuities, and it is clear that, at the date the policy is taken out, an immediate equitable interest comes into being in favour of the wife: *Cousins* v. *Sun Life Assurance Society* [1933] Ch. 126. A warning is necessary, however : the policy moneys should be payable wholly to the wife and/or children, and no interest, even on the contingency of the wife's dying first, should be reserved to the husband: see *Sharp's Trustees* v. *I. R. C.* [1951] T.R. 81; *Att.-Gen.* v. *Pearson* [1924] 2 K.B. 375. The advantages of this type of provision are that, if the policy is taken out long before death, provision may be made by a series of payments out of income, and moreover, the five-year period is irrelevant.

It would appear at first sight that enormous savings may be made by means of the purchase of annuities and policies, without the necessity of relying on the five-year period. It will probably be found, however, that most insurance companies are unwilling to entertain repeated proposals for large transactions, since they are co-operating with the revenue authorities in keeping these methods of duty avoidance from becoming too widespread. Policies are more usually sought than annuities, since the principle of separate aggregation is well established in cases of policies, and it is believed that an insurance company will not grant more than one policy in favour of a wife and one in favour of a child in any one year. Even so, a very substantial saving is possible.

Benefits out of a partnership

It may be useful to indicate briefly a few of the considerations which should be taken into account where the person seeking to make provision for his widow happens to be a member of a partnership.

One provision which is not as well-known as it should be is contained in the Income Tax Act, 1952, s. 525 (1) (a). That section deals with "earned income," against which the taxpayer

may claim earned income allowance, and provides that it includes "any income . . . given in respect of the past services of the individual or of the husband or parent of the individual in any office or employment of profit, or given to the individual in respect of the past services of any deceased person, whether the individual or husband or parent of the individual shall have contributed to such pension, superannuation allowance or deferred pay or not." It will be observed that the enactment deals with two different cases, the first being pensions in respect of "any office or employment of profit," the second pensions in respect of services. While the former would apply to provision made for the widow of a director of a company, the latter covers provision made between partners. Nowadays the earned income allowance is so substantial that it should always be taken into consideration when planning an income for the widow of a partner or a director of a private company.

Where an owner sells his business, or a partner his share, it may be possible to make provision for the widow or other dependants of the seller in such a way that a reduction is effected in the amount of estate duty which would normally be payable on the death of the seller. The success of this depends on two decisions of the High Court, which repay careful examination; there is the disadvantage that the widow has no direct legal right to anything, but relies on the good faith of the purchaser. The first of these decisions is *Re Miller's Agreement* [1947] Ch. 615, in which the facts were as follows. A retiring partner wished to provide for his daughters after his death. Therefore, by a deed of covenant executed at the same time as the deed of dissolution, the continuing partner covenanted with the deceased to pay certain annuities to the daughters after his death for their respective lives. Although the annuities were expressly charged on the partnership assets, no trust was created in favour of the daughters, and the covenant was not expressed to be made with, or for the benefit of, the daughters. The retiring partner died about a year later, and estate duty was claimed by the Crown under the Finance Act, 1894, s. 2 (1) (d). The court held that, although the obligation to pay was binding as between the surviving partners and the executors of the deceased, it was unenforceable by the daughters, who were not parties to the deed; consequently the daughters had no right to anything, except to retain each payment as it was made. As a result, section 2 (1) (d) was inapplicable to the benefits they obtained under the deed. The other case is *Re J. Bibby & Sons Ltd. Pensions Trust Deed* [1952] 2 T.L.R. 297, which concerned a pension given to the widow of the employee of

a company by the trustees of a pensions fund. The fund was held by the court to be, on the true construction of the trust deed, entirely at the discretion of the trustees, who were not bound to award a pension to any particular individual, or at all; it followed that, if the trustees in fact exercised their discretion by awarding an annuity to the widow of an employee, to run from his death, there was no charge to estate duty under section 2 (1) (d). It might have been different if it had been a condition of the employee's contract that his widow should have such-and-such rights and the trustees had carried out their part of the bargain by appointing a pension to the widow.

Of the two decisions just mentioned the former is more likely to be of practical value to a partner who contemplates retiring. Should the continuing partners fail in their undertaking to pay the widow her pension, the personal representatives of the deceased husband would presumably be able to bring a common law action on the covenant for debt, although they would have no duty to the widow to do so, and it is not wholly clear how they could claim payment of a debt not due to them. The widow would really have to rely on the good faith of the partners. Moreover, if the husband appoints his widow his executrix, or she takes out a grant of administration, it appears that the benefit of the scheme will be lost: the widow will be able to enforce the claim for an annuity by an action for damages and consequently can be said to have an interest, that is, a legally enforceable interest, in her pension, and in consequence estate duty would become payable under the Finance Act, 1894, s. 2 (1) (d). The husband should not appoint his wife executrix and should, if need be, leave with his will some warning against her taking out a grant.

In order to bring a case within the principle of *Re Miller's Agreement*, care should be taken that the annuity is secured by a covenant between the partners; if a charge is to be added, it should be purely ancillary to the covenant. The draftsman could with profit consider the facts in *Att.-Gen.* v. *Wendt* (1895) 73 L.T. 255. A deed between partners provided for an annuity to the widow of the senior partner, to be paid out of the profits of the business and secured by a bond in favour of the wife. A claim was made for account duty under the Customs and Inland Revenue Act, 1881, s. 38 (2), as amended by the Customs and Inland Revenue Act, 1889, s. 11—enactments which, when account duty was superseded by estate duty, were preserved by the Finance Act, 1894, s. 2 (1) (c). The Crown argued that there had been a passing of property under a settlement *inter vivos*, whereby an interest was reserved, an argument often used in estate duty cases. The decision

of the court was that duty was payable as claimed, since the deed was a settlement of the partner's share in the firm, out of which the settlor reserved to himself an interest for his life. Now that case is distinguishable from *Re Miller's Agreement*, although it was not cited therein, on several grounds, one of which is that the widow in that case received property under the deed, namely, a share in the income of the partnership, whereas in *Re Miller's Agreement* the widow received no legally enforceable benefit, except the right to retain the sums actually paid.

It may be objected that there is really no need to go to the lengths of providing widows' pensions: better stick to the traditional means of providing for the widow by allowing the share in the firm to form an asset of the estate. The answer to this is that the traditional means is often ineffective. The estate duty on the share may cripple either the estate or the partnership. It is therefore frequently advisable to remodel the partnership on a " nothing in, nothing out " basis, so that retiring partners get no capital sum, and new partners are not asked for a premium. This is fairly easily done where the greatest asset of the partnership is goodwill: the goodwill is made to accrue to the surviving partners on the death or retirement of any one partner, and no money is paid for it. Admittedly on the death of any partner there is a passing of his share, so that prima facie a charge to estate duty arises; this liability is however nullified by the Finance Act, 1894, s. 3 (1), since the passing takes place " by reason only of a bona fide purchase " and there is complete exemption.

Here again a pair of cases illustrate how the exemption may be gained. In *Att.-Gen.* v. *Boden* [1912] 1 K.B. 539, a family business was in question: a father and his two sons carried on a trade under terms of partnership which provided that on the death of the father his whole interest in the firm was to pass automatically to the sons; for this they were to pay to his estate the value of the interest, minus goodwill, and the goodwill was to accrue to them without any payment at all. The father died and estate duty was paid on the value of his interest without allowing for goodwill. The Crown claimed a further payment of duty in respect of the goodwill which accrued to the sons. The decision reached by the court was that the sons had given unusually stringent undertakings in the deed of partnership, and that these were sufficient consideration for the passing of the goodwill, so that there was exemption from estate duty. That case was referred to in *Att.-Gen.* v. *Ralli* (1936) 15 A.T.C. 523, 527, where the same principle was applied to an accrual, not of goodwill, but of a share in enormous reserves of capital, the retention of which was necessitated by the nature of the business

carried on. The provision, that the interest of each partner in these reserves should accrue on his death or retirement to the survivors, came into operation when the senior partner died a few days after his retirement. It was held that the Finance Act, 1894, s. 3 (1) applied, so that there was exemption from estate duty.

In view of the principle underlying those two cases, it may often be advisable not to provide for a partner's widow, or even for a partner himself during retirement, by sale of the goodwill to the survivors.

Assuming that a partner prefers to retain his share of the business, so that it is purchased from himself as his estate by the surviving partners, it is usually convenient for all concerned that the purchase price should be paid by instalments, rather than in one lump sum. In days of lower taxation the primary considerations were, whether the widow preferred a lump sum or instalments, and whether the surviving partners were able to raise the capital sum required. Today a rather different factor takes first place: how the tax-gatherer's harvest may be kept within the closest bounds. It is, however, well settled that instalments of capital paid to the widow or the personal representatives of a deceased partner remain capital, even though paid at regular intervals and in equal instalments without accrual of interest: *Foley* v. *Fletcher* (1858) 3 H. & N. 769, applied in a succession of later cases. This being so, the widow is assured of a tax-free income. On the other hand, since the payments are capital, the surviving partners are at a disadvantage, being unable to deduct the payments from the profits of the firm or to treat them as annual payments; they must pay them out of taxed income.

Whether the payment of tax-free sums to the widow effects a saving of tax as against the payment of taxable income, depends on the comparative wealth of the widow and the surviving partners: if the widow pays a high rate of surtax while the partners do not, the payment of tax-free sums will cause rather less tax to be payable, while if the widow is comparatively poor and the partners well off, the payment of annual sums to the widow will cost the partners comparatively little, and the widow will pay only a small amount of tax. It may be, therefore, that a partner should be advised against providing his widow with instalments of tax-free capital. Instead, he may prefer to provide a pension, secured by a covenant, in the way described above; a pension payable to the widow for life can scarcely be regarded as a series of instalments of capital. Sometimes partners have tried to get the best of both worlds: to pay sums of money for a fixed term only, rather than be burdened with an annuitant who never seems to get nearer death,

and yet to cause those sums to be regarded as income, not capital. Any such attempt is likely to be somewhat hazardous, and two decided cases seem to indicate where the borderline lies. In the first of these, *Mackintosh* v. *I. R. C.* (1928) 14 T.C. 15, the partners had executed a deed whereby, on the death of the senior partner, the others were to be able to use the firm's name, trade-marks and goodwill, paying to the executors of the deceased the sum of £500 quarterly for the period of five years "after which it may be enjoyed without further payment." It was held that these payments were of income, not of capital; consequently the widow, who was entitled under the will, was liable to tax and the partners were entitled to deduct the sums paid from their profits. The other case is *I. R. C.* v. *Hogarth*, 1941 S.C. 1; 23 T.C. 491. There the agreement was to pay a sum equal to one fourteenth of the net profits of the partnership for the three years ending on December 31, 1937, 1938 and 1939 respectively under deductions of tax. Here again the payments were held to be income.

It appears from the foregoing that it is possible to provide a widow with a series of regular payments over a fixed period, and yet to ensure that those payments are not instalments of capital. Considerable circumspection is however required and each case requires careful consideration in the light of its own facts.

Discretionary Trusts.

Finally a few words may be said on the subject of discretionary trusts. This type of disposition, if carefully planned and executed more than five years before death, may preserve an estate from paying any duty for any period up to something like sixty or eighty years—in effect, for the perpetuity period. Few hard and fast rules can be laid down, for each case depends on the tastes and requirements of the individual settlor, but no solicitor should permit a wealthy client to make his will without at least mentioning the advantages of a discretionary trust. Of course, one drawback which has to be faced is that the settlor loses the benefits of the property almost completely, although he may retain some control by indirect means. All that concerns us here is that, whereas neither the settlor nor his wife may be members of the class of beneficiaries, the settlor's widow may. The reason for this is that the expression "wife of the settlor," which occurs in the Income Tax Act, 1952, ss. 404 and 405, has been held to apply to the wife only as long as she is the wife of the settlor: *Vestey's Executor* v. *I. R. C.* [1949] 1 All E.R. 1108. Therefore, in a carefully drawn settlement, the widow may be provided for as part of a more general provision for a wide class.

THE LAW OF STAMP DUTIES

(*Continued from Volume* 17)

By J. G. Monroe, Barrister-at-Law

IV Leases

Rents and premiums

Under the heading in the First Schedule to the Stamp Act, 1891 (*b*), Lease or Tack, *ad valorem* duty is imposed on leases (other than certain leases of dwelling-houses for terms of not more than a year) by reference to the amount of the rent, and by reference to the amount of any other consideration consisting of money, stock or marketable securities (*c*) payable either to the lessor or to any other person. The commoner example of the latter type of consideration is the lump sum premium, and it will here be referred to as such. The Act does not contain any definition of a lease and it is to be assumed that it has the same meaning as under the general law. The difficulties that there arise in distinguishing a lease from a licence will not be considered here, but this distinction is important for stamp duties as licences at a "rent" bear duty under a different head (*d*). A lease is one of the instruments in the table in section 15 (2) of the Act in respect of which a penalty of the amount of the duty is exigible for stamping more than thirty days after execution in the United Kingdom, or after it is first received in the United Kingdom, and a fine is imposed on the lessee for failure to have it so stamped.

Ad valorem duty on premiums

Ad valorem duty is payable on a premium or other consideration in money, stock or marketable securities (except on certain leases of dwelling-houses for not more than a year) at the same rate as if it were consideration for a conveyance on sale, *i.e.*, at the basic rate of £2 per cent. The duty was originally 10s. per cent. (*e*) and has twice been doubled (*f*) in the same way as duty on the

(*b*) 54 & 55 Vict. c. 39.
(*c*) The definition of stock and marketable securities is considered later.
(*d*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule I: Bond, Covenant or other Instrument.
(*e*) *Ibid.*, Schedule I: Lease or Tack No. (3).
(*f*) Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 75; and Finance Act, 1947 (10 & 11 Geo. 6, c. 35), s. 52.

conveyance on sale. There is provision for lower rates of duty where the amount of the premium is less than £500, £3,000 or £3,450, in exactly the same way as on a conveyance on sale, where the instrument contains a statement certifying that the transaction thereby effected does not form part of a larger transaction or of a series of transactions, in respect of which the amount or value or the aggregate amount or value of the consideration, other than rent, exceeds £500 or £3,000 or £3,450 (*g*), and reference should be made to the comments on the corresponding provisions relating to "Conveyance on Sale," made under that head (*gg*). It should be noticed, however, that there is an overriding limit of £20 per annum on the rent or average rent for these reduced rates to be applicable.

It should be noted that it makes no difference whether the payment is made to the lessor or some other person. This is mainly of importance in cases where the landlord agrees with a builder to allow him to build houses which are let at a rent payable to the landlord, and a lump sum at the same time paid to the builder (*h*). The position here is similar to the position where land is sold and there is a contemporaneous building agreement. It is thought that if the house is built before there is an agreement for the lease the whole payment to the builder is liable to duty as a premium, but that there is no liability if the agreement precedes the building. If the house is half erected at the time of the agreement the premium must be apportioned (*l*).

Ad valorem duty on rents

Like *ad valorem* duty on premiums the like duty on rents has twice been doubled (*m*) since it was fixed by the Stamp Act, 1891 (*n*). The second doubling, however, does not apply (inter alia) to any lease where the rent does not exceed £100 per annum,

(*g*) See Revenue Act, 1911 (1 Geo. 5, c. 2), s. 15; Finance Act, 1947 (10 & 11 Geo. 6, c. 35), s. 54 (6); and Finance Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 32), s. 73.

(*gg*) See Vol. 17, p. 500*p*. The rates (depending on the amount named in the certificate) are respectively 10s., £1 and £1 10s. per £100. The right to exclude goods from consideration in giving the certificate conferred by Finance Act, 1949 (12, 13 & 14 Geo. 6, c. 47), s. 36, has no application to premiums on leases.

(*h*) *Att.-Gen.* v. *Brown* (1849) 3 Ex. 662.

(*l*) This question was discussed in relation to sale. It should be noted that the two Scottish sale cases, *M'Innes* v. *I. R. C.* 1934 S.C. 424 and *Paul* v. *I. R. C.* 1936 S.C. 443, are cases of feu contracts corresponding roughly to a sale for a perpetual rentcharge. The analogy of the lease is thus very close. The right to ask for a premium is seriously curtailed by Landlord and Tenant (Rent Control) Act, 1949 (12 & 13 Geo. 6, c. 40), s. 2.

(*m*) By Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 75, and Finance Act, 1947 (10 & 11 Geo. 6, c. 35), s. 52.

(*n*) 54 & 55 Vict. c. 39.

the term is for not more than thirty-five years or is indefinite, and there is no premium (*o*). This is such a common case that it must be dealt with forthwith, and not merely among the exemptions at the end. Under the Stamp Act, 1891 (*p*), *ad valorem* duty on the rent was fixed at three separate rates (1) in respect of a lease for a term of not more than thirty-five years, or for an indefinite term; (2) in respect of a lease for a term exceeding thirty-five years but not exceeding 100 years; and (3) in respect of a lease for a term exceeding 100 years. The present position is that where the rent or average rent does not exceed £100 per annum, class (1) above is divided into two parts. The present rates are (A) for class (1) where the rent or average rent is not more than £100, and there is no premium or other consideration besides rent, £1 per cent. of the rent or average rent; and where the rent or average rent is more than £100, or where there is a premium or other consideration, £2 per cent. of the rent or average rent; (B) for class (2) £12 per cent. of the rent or average rent; and (C) for class (3) £24 per cent. of the rent or average rent (*q*).

These provisions as to rent raise one or two problems. First, there is no definition of rent and it is not every periodical payment under a lease that is rent, *e.g.*, payments for services. If such payments are reserved as rent they must be included in the rent for the purpose of computing the duty; if not they will bear separate duty under another head (*r*).

Leases are almost unique among the subjects of *ad valorem* duty in that payments otherwise than in cash, stock or marketable securities may form the basis of the duty, as it is provided that where any part of the consideration for a lease consists of produce or other goods the value is to be deemed a consideration in respect of which the lease is granted (*s*). This will normally be rent. If it is not rent, then, even though it is not by a payment of money or stock or marketable securities, it will have the effect of doubling the duty on the rent under a class (1) lease where the rent does not exceed £100.

No additional duty is payable on a lease by reason of any penal

(*o*) Finance Act, 1947 (10 & 11 Geo. 6, c. 35), s. 54 (2).

(*p*) 54 & 55 Vict. c. 39.

(*q*) Reference must be made to a table of duties for details of the steps by which it rose.

(*r*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule I: Bond, Covenants or other Instrument. See also Revenue Act, 1909 (9 Edw. 7, c. 43), s. 8, overriding the effect on this point of *British Electric Traction* v. *I. R. C.* [1902] 1 K.B. 441.

(*s*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 76. This section provides for computing the duty in some cases of such payments in kind.

rent (*t*); nor by reason of any payment for any improvement or addition to the property made by the lessor, or for or under some covenant relating to the subject-matter of the lease (*u*), unless in the latter case such covenant would attract *ad valorem* duty (*a*). An instrument increasing the rent is to be stamped as a lease for the additional rent (*b*).

The term of years

The rate of duty depends in part upon the length of the term of the lease, depending on whether the lease is for an indefinite term, or for a term not exceeding thirty-five years, or for a term exceeding thirty-five years and not exceeding 100 years, or for a term exceeding 100 years. A lease for a specified number of years determinable on an event such as a death is a lease for the term of years specified and not for an indefinite term (*c*). A lease for an indefinite term not expressed as a lease for a definite term terminable in an uncertain event is invalid (*d*). Accordingly, it is thought that the only leases for an indefinite term are those granting a weekly or other periodic tenancy (*e*). A lease for a term of years with an option to renew for a further term or terms is liable to duty only on the original term (*f*). It would seem that if the option is exercised the instrument exercising the option would be an agreement for a further lease and liable to stamp duty as such. A lease for a term of seven or more years must be produced to the Commissioners and stamped with a stamp denoting that this has been done (*ff*). This is in addition to the requirement of stamping. But it may be done at the same time as the stamping.

Duty on an agreement for a lease

An agreement for a lease is almost as good as an actual lease (*g*), and it is provided by section 75 of the Stamp Act, 1891 (*h*) (for much the same reason that certain agreements for sale are dutiable

(*t*) *Ibid.*, s. 77 (1).
(*u*) *Ibid.*, s. 77 (2).
(*a*) Revenue Act, 1909 (9 Edw. 7, c. 43), s. 8, overriding *British Electric Traction* v. *I. R. C.* [1902] 1 K.B. 441.
(*b*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 77 (5).
(*c*) *Mount-Edgcumbe (Earl)* v. *I. R. C.* [1911] 2 K.B. 24. *Cf. Kushner* v. *Law Society* [1952] 1 K.B. 264.
(*d*) *Lace* v. *Chantler* [1944] K.B. 368.
(*e*) See, *e.g.*, *Bowen* v. *Anderson* [1893] 1 Q.B. 164, as to the nature of a periodic tenancy.
(*f*) See *Hand* v. *Hall* (1877) 2 Ex.D. 355.
(*ff*) Finance Act, 1931 (21 & 22 Geo. 5, c. 28), s. 28. There is an exception in favour of leases executed in pursuance of an agreement for a lease duly produced.
(*g*) *Walsh* v. *Lonsdale* (1882) 21 Ch.D. 9.
(*h*) 54 & 55 Vict. c. 39.

as if they were conveyances on sale (*l*)), that an agreement for a lease for an indefinite term, or for a term of less than thirty-five years, shall be liable to duty as a lease for the same period, and that a subsequent lease in conformity with the agreement shall require to be stamped at the rate appropriate to the agreement (6d. or 10s.). The section contains no provision for refund of the duty if the agreement is void or avoided or is not performed (*m*). Among such agreements would be notices exercising an option for renewal for a term within the section, or a notice withdrawing a notice to quit with the assent of the other party (*n*).

It is suggested that as a memorandum of an agreement for sale may be dutiable as a conveyance on sale (*o*), a memorandum for an agreement for a lease within the section would be dutiable as a lease. However, under an earlier enactment, which contained no corresponding provision, it was held that a memorandum of such an agreement was not, for purposes of stamp duty, a lease (*p*), and it is believed that the official view now is that such a memorandum is not chargeable under this section at the rate appropriate to a lease.

An agreement for a lease for a term of seven years or more (whether for more or less than thirty-five years) must be produced to the Commissioners and stamped with a stamp denoting that it has been so produced (*pp*).

Reduced and lower rates of duty

It has already been mentioned that the duty on the premium element in the consideration for a lease may be reduced where the rent does not exceed £20 per annum and the premium element does not exceed £500, £3,000 or £3,450, as the case may be (*q*), and also that the doubling of the duty effected by section 52 of the Finance Act, 1947 (*r*), does not apply to certain leases, no matter who is the lessee (*s*). It was provided also that such increases

(*l*) *Ibid.*, s. 59.

(*m*) Relief in this respect may occasionally be obtained under Stamp Duties Management Act, 1891 (54 & 55 Vict. c. 38), s. 9 (7).

(*n*) *Freeman* v. *Evans* [1922] 1 Ch. 36.

(*o*) Under Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 59; see *Fleetwood-Hesketh* v. *I. R. C.* [1936] 1 K.B. 351.

(*p*) *Eagleton* v. *Gutteridge* (1843) 11 M. & W. 465.

(*pp*) Finance Act, 1931 (21 & 22 Geo. 5, c. 28), s. 28.

(*q*) Revenue Act, 1911 (1 Geo. 5, c. 2), s. 15; Finance Act, 1947 (10 & 11 Geo. 6, c. 35), s. 54 (6); and Finance Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 33), s. 73.

(*r*) 10 & 11 Geo. 6, c. 35.

(*s*) Leases for a term of less than thirty-five years or for an indefinite term at a rent not exceeding £100 per annum, where there is no premium or consideration in money, stock or marketable securities other than rent: Finance Act, 1947 (10 & 11 Geo. 6, c. 35), s. 54 (2).

should not apply to a lease granted to a body of persons established for charitable purposes only; or to the trustees of a trust so established (*t*). To justify the reduced rate in this latter case an adjudication stamp is necessary (*u*). Accordingly, except for the leases mentioned in footnote (*s*) and the reduced rates on premiums above, leases to charities are stamped at half the rate applicable to leases to other persons.

Two classes of lease are excluded altogether from the main rates of duty outlined above by the terms of the First Schedule to the Stamp Act, 1891 (*a*). These are or rather were (1) a lease of a dwelling-house or part of a dwelling-house for any definite term not exceeding one year at a rent not exceeding £10 per annum, on which the duty was fixed at 1d.; and (2) a lease of any furnished dwelling-house or apartments for any definite term less than a year with a rent exceeding £25 per annum, on which the duty was fixed at 2s. 6d. The maximum rent under (1) above was raised to £40 by section 35 of the Finance Act, 1924 (*b*). The duty of 1d. under (1) above escaped, but the duty of 2s. 6d. under (2) above did not escape, the doubling effected by the Finance (1909–10) Act, 1910 (*c*). Both came in for the doubling effected by the Finance Act, 1947 (*d*). But unless, in the case of the duty under (1), there is a premium or other consideration in money or stock or marketable securities (which is illegal if the letting is within the Rent Restriction Acts (*e*)), the doubling will not apply, nor will it apply under (2) unless there is such premium or other consideration, or the rent exceeds £100 per annum, nor will it apply in either case if the lessee is a charity. The rates of duty in cases (1) and (2) are therefore 1d. or 2d. and 5s. or 10s. respectively—the duties of 1d. and 5s. respectively being slightly more probable. It will be noted that whereas under (1) the lease must not exceed a year, under (2) it must be less than a year. This leads to the ridiculous conclusion that the lease of a furnished dwelling-house for one year at a rent exceeding £25 but not exceeding £40 per annum will bear a 1d. stamp, but that for one or more days less the stamp would be 5s.

The stamp in these two cases may be an adhesive stamp cancelled by the person first executing the instrument (*f*). When the stamp

(*t*) *Ibid.*, s. 54 (1).
(*u*) *Ibid.*, s. 54 (1), proviso.
(*a*) See Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule I: Lease or Tack, Nos. (1) and (2).
(*b*) 14 & 15 Geo. 5, c. 21.
(*c*) 10 Edw. 7, c. 8.
(*d*) 10 & 11 Geo. 6, c. 35.
(*e*) Landlord and Tenant (Rent Control) Act, 1949 (13 & 14 Geo. 6, c. 40), s. 2.
(*f*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 78 (1).

is 1d. or 2d. an ordinary postage stamp may be used, but a special stamp must be obtained where the 5s. or 10s. stamp is needed (*g*). A fine for omission to stamp is imposed on every person who executes, prepares, or is employed in preparing, such lease (*h*).

A maximum duty of £1 15s. is laid down for leases determinable on not more than three lives or for less than twenty-one years granted by any Ecclesiastical Corporation (*i*).

Where there is no rent and no premium, or for any reason the lease does not fall within any of the previous categories, there is a duty of £1 or £2 (*k*).

V Mortgages

The heading "Mortgage, Bond, Debenture, Covenant," in the First Schedule to the Stamp Act, 1891 (*l*), is divided into five sub-headings, *viz.* (1) principal securities, (2) collateral securities, (3) equitable mortgages, (4) transfers, and (5) reconveyances, each of which is subject to its own rules and rates of duty. It is necessary to look at each of them separately. It should be stated at the outset that this head of duty is, primarily at least, directed at securities for the payment or repayment of a single principal sum and interest and the repayment of a sum by instalments, and not at the payment (as opposed to repayment) of a series of sums or instalments which, strictly at least, fall under a different head of duty (*m*). This heading is one of those mentioned in the table in section 15 (2) of the Act under which a penalty of the amount of the duty is imposed for stamping more than thirty days after execution in the United Kingdom, or after this instrument is first received in the United Kingdom, and a fine of £10 is imposed on the person specified in the table for failure to stamp.

There is an exemption in favour of (inter alia) mortgages to Building Societies registered under the Building Societies Act, 1836 (*n*). There are not many such societies, and the extent of the exemption so far as it relates to mortgages is curtailed by

(*g*) *Ibid.*, s. 7.
(*h*) *Ibid.*, s. 78 (2).
(*i*) *Ibid.*, s. 77 (3).
(*k*) The duty originally fixed by the Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule I: Lease or Tack, was 10s. It was doubled by Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 75, and again by Finance Act, 1947 (10 & 11 Geo. 6, c. 47), s. 52. This second doubling does not apply to leases to charities or to leases at a sum not exceeding £100 per annum for an indefinite term or a term not exceeding thirty-five years where there is no premium or other consideration in cash, stock or marketable securities.
(*l*) 54 & 55 Vict. c. 39.
(*m*) *Ibid.*, Schedule I: Bond, Covenant or other Instrument.
(*n*) 6 & 7 Will. 4, c. 32, s. 8.

section 89 of the Stamp Act, 1891 (*o*). Mortgages of ships are exempt under No. (2) of the General Exemptions at the end of the First Schedule to the same Act, so long as the mortgage of a ship is the primary object of the instrument (*p*).

(1) *Principal security*

The first sub-heading is "Mortgage, Bond, Debenture, Covenant, etc. (except a marketable security otherwise specially charged with duty), and warrant of attorney to confer and enter judgment, being the only or principal or primary security (other than an equitable mortgage) for the payment or repayment of money" (*q*), and the rate of duty is 5s. per cent. of the amount (*i.e.*, the principal amount) secured (*r*), or (where the transfer of stock is secured) on the value of the stock (*s*). The rate was originally half this but was doubled by the Finance Act, 1947 (*t*). This duty is chargeable on each of the four types of instrument listed. It will be convenient to take them out of their order and to deal with "Bond" and "Covenant" first. It should be noted that the word "security" does not necessarily connote anything securing an already existing obligation. It may originate an obligation (*u*).

Bond and Covenant

The two words "Bond" and "Covenant" in England indicate instruments under seal (*w*) and, although in Scotland the word "Bond" does not, it has been held there that it is not an appropriate word to describe a commercial document under hand such as the guarantee of a bank overdraft (*x*). It is thus, in ordinary cases, only if the instrument falls under the head "Mortgage, Bond, Debenture," etc., that an instrument under hand can be liable to duty under this head at all. There is an important distinction, therefore, between this head and the head under which periodical payments are charged, where the words of the head of duty are "Bond, Covenant or Instrument of any kind whatever" (*y*). A commercial document under seal and containing a covenant

(*o*) 54 & 55 Vict. c. 39.
(*p*) See *Deddington Steamship Co.* v. *I. R. C.* [1911] 2 K.B. 1001.
(*q*) *Ibid.*, Schedule I: Mortgage, Bond, Debenture, Covenant No. (1).
(*r*) Reference must be made to a table of duties for full particulars of the steps by which the duty rises.
(*s*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 87 (1). The definition of "stock" is considered in a later article.
(*t*) 10 & 11 Geo. 6, c. 35, s. 52.
(*u*) *Jones* v. *I. R. C.* [1895] 1 Q.B. 484, at p. 492.
(*w*) *National Telephone Co.* v. *I. R. C.* [1900] A.C. 1, at p. 2.
(*x*) *North of Scotland Bank* v. *I. R. C.* 1931 S.C. 149.
(*y*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule I: Bond, Covenant, etc.

for the payment of money, is probably liable to duty under this head, or (in the case, for instance, of a guarantee) as a collateral security. Although it is thought not to be the practice of the Revenue to ask for *ad valorem* duty on commercial contracts, the fact remains that the instrument (*yy*), if it strictly ought to bear *ad valorem* duty, is not properly stamped without it. On the whole it is wisest to refrain from putting such documents under seal if a seal is not legally necessary.

It should be noted that an instrument, expressed to be or to evidence a mortgage or a borrowing, under which the principal is never to be repaid, but interest is to be paid for ever, does not fall within this charge to duty at all, but pays the heavier conveyance on sale duty as the purchase of an annuity (*z*).

Mortgage

The main head of duty is the mortgage, which is defined at great length in section 86 of the Stamp Act, 1891 (*a*). Subsection 1 defines "mortgage" and subsection (2) defines "equitable mortgage," which is not entirely synonymous with an equitable mortgage under the general law. The charge to duty on equitable mortgages is different from that now being considered, and an equitable mortgage is expressly excluded from the charge at present under consideration. Reference must be made to the section for the full statutory definition. It would seem that any security by way of charge for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, is a mortgage under the Act. Broadly speaking, an equitable mortgage is a mortgage under hand only (*b*). Accordingly it will be found that mortgages under seal are the principal mortgages covered by this charge to duty, but possibly some mortgages under hand only are included (*b*). It should be stated that mortgage bills of sale are referred to this head in the First Schedule to the Act (*c*), and that the Registrar of Bills of Sale is expressly prohibited from registering an insufficiently stamped bill of sale (*d*). An ordinary pledge, if its terms are evidenced by an instrument in writing, would appear to be within the definition of mortgage, and would

(*yy*) See Halsbury's Laws of England, 2nd ed., vol. 16, p. 50, note (*s*). In *Prudential Insurance Co.* v. *I. R. C.* [1904] 2 K.B. 658, at p. 662, it was assumed that a policy of life insurance was not chargeable under this head.

(*z*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 60; *Mersey Docks and Harbour Board* v. *I. R. C.* [1899] 2 Q.B. 316.

(*a*) 54 & 55 Vict. c. 39.

(*b*) This will be considered in greater detail under the head of "Equitable Mortgage."

(*c*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule I: Bill of Sale.

(*d*) *Ibid.*, s. 41.

according to circumstances be chargeable under this head or as an equitable mortgage.

Debenture

The remaining class of instrument charged under this head is a "Debenture," which is not defined in the Act. The best known judicial definition is that it is "any document which either creates a debt or acknowledges it" (*f*). It is suggested that this is too wide, as it could hardly be said, for instance, that a contract for the sale of goods was a debenture because it created a debt due to the vendor. In fact, taking a clue from the definition of mortgage, it would seem that a more accurate definition, at least for present purposes, is "any document which . . . creates a debt for money lent or advanced or which acknowledges (in such manner as to import a promise to pay) money already due and owing on any account." Moreover, it is questionable whether a debenture is apt to describe any document produced by an individual. The term as used in practice is virtually confined to the documents of bodies corporate and unincorporate. A debenture does, however, differ from a mortgage in that there is no need for any charge on any property to be contained in it (*g*), nor need a debenture be under seal (*h*), though if it is not under seal it may be an equitable mortgage. It should be noted in connection with debentures under this head that marketable securities (*l*) are excluded. The commonest form of debenture is probably the registered debenture forming one of a series issued by a company. Such debentures are usually marketable securities (*m*), though it is undoubtedly possible to incorporate such terms in them as will prevent them from being marketable securities. The duty on marketable securities not transferable by delivery and upon debentures is the same; it is when we consider transfers that the difference becomes important. A certificate of debenture stock properly so-called is not a debenture or a mortgage or a bond or a covenant or (unless it is by custom transferable by delivery) a marketable security, though some documents masquerading as debenture stock certificates may be one of these things (*n*).

(*f*) *Per* Chitty J. in *Levy* v. *Abercorris Slate and Slab Co.* (1887) 37 Ch.D. 260, at p. 264.

(*g*) *Cf.* the definition in the Companies Act, 1948 (11 & 12 Geo. 6, c. 38), s. 455 (1).

(*h*) *British India Steam Navigation Co.* v. *I. R. C.* (1881) 7 Q.B.D. 165.

(*l*) The definition of a marketable security is considered later.

(*m*) See, *e.g.*, *Deddington Steamship Co.* v. *I. R. C.* [1911] 2 K.B. 1001.

(*n*) This question will be considered later.

Amount secured

The duty under this head is charged at the above-mentioned rate of 5s. per £100 of the amount secured. Problems, however, sometimes arise in determining the amount secured, thus :—

(i) Where a premium is to be paid on redemption of a mortgage, then the amount of the premium is included in this principal amount (*o*), though where the mortgagor has only an option to redeem at a premium, the premium is not included (*p*).

(ii) Where repayment is made in the form of an annuity (*q*), rentcharge or periodical payment (of which the commonest example is a building society mortgage repayable by instalments), duty is charged as on a security for the payment of the money lent or advanced (*r*). This provision applies only to repayment of money lent or advanced and not to money paid under covenant which is charged under a different head (*s*).

(iii) Where the security is for further advances, or for moneys lent upon a current account, and the amount secured or recoverable is in any way limited, duty is payable on the limit, although no further advance is made for the time being or at all (*t*). An extreme example of this occurred where on a deed providing that certain debenture stock secured by an earlier deed might, in special circumstances, be reissued once only; stamp duty was held to be payable on the whole amount of the stock (and the premium on redemption thereof), although in fact it was extremely improbable that the whole of such stock either would or could, consistently with the terms of the deed, be reissued (*u*). Thus, where it is desired to secure moneys by an instrument, and to give power to borrow, at a later date, further moneys on an equal ranking security up to a limit, it should be done by reserving the right to do so by separate instrument. Duty on the further amount will then only be payable if and when the separate instrument is executed. But if the first instrument is expressed as the security for the present advance and for the future there is an immediate liability for duty on the full maximum.

(iv) Where the security is for further advances, or for moneys

(*o*) *Rowell* v. *I. R. C.* [1897] 2 Q.B. 194.

(*p*) *Knight's Deep, Ltd.* v. *I. R. C.* [1900] 1 Q.B. 217.

(*q*) For an example of repayment by way of an annuity, see *Commercial Union Assurance Co., Ltd.* v. *I. R. C.* [1938] 2 K.B. 551. A periodical payment is not the same as an annual payment for income tax purposes: *ibid.*

(*r*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 87 (2).

(*s*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule I: Bond, Covenant or Instrument, etc.

(*t*) *Ibid.*, s. 88 (1): *City of London Brewery* v. *I. R. C.* [1899] 1 Q.B. 121. The limit must be contained in the security: *Halse* v. *Peters* (1831) 2 B. & Ald. 807.

(*u*) *International Power Co.* v. *I. R. C.* (1933) 12 A.T.C. 413.

lent upon a current account, and the amount is not limited, then the security is available only for the amount which it is stamped to cover; but where any advance or loan is made in excess of the amount covered by that duty the security is treated, for stamp duty purposes, as a new and separate instrument bearing date on the day on which the advance or loan is made (*a*). The amount secured is not unlimited because any of the incidental amounts secured, such as interest which as stated in paragraph (v) below are disregarded, are of uncertain amount (*b*). If further advances are made on a security, but the person entitled to the benefit of the security relies on it only to the extent to which it is stamped, *e.g.*, because the property charged is not worth more than the amount for which the instrument is stamped, no additional stamp is required (*c*). In the event of the security turning out to be more valuable than had been supposed it could no doubt be stamped under penalty out of time, and the security would not be limited to the amount of the stamp (*d*).

(v) Mere incidentals which in fact are covered by the security are disregarded in assessing the duty. Such incidentals include uncapitalised interest (*e*), mortgagee's expenses (*f*), and money expended or to be expended on the mortgaged property (*g*). The existence of a charge for these matters does not render the security unlimited for the purpose of paragraph (iv) above (*h*). Moreover a mortgage is not charged with additional duty by reason of the equity of redemption being thereby conveyed to anyone other than a purchaser or a trustee for a purchaser (*l*). If it is limited to a purchaser, conveyance on sale duty will be payable (*m*). It seems a reasonable inference that since the introduction of voluntary conveyance duty (*n*) such duty would be payable if the equity of redemption were limited to a donee or a trustee for a donee.

(2) *Collateral and substituted securities*

The second sub-head of duty is like the first, except only that instead of referring to the principal or primary security it refers

(*a*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 88 (2).
(*b*) *Suffield* (*Lord*) v. *I. R. C.* [1908] 1 K.B. 865.
(*c*) *Re Waterhouse's Policy* [1937] Ch. 415.
(*d*) See *Lachmi Narayan Agarwalla* v. *Braja Mohan Singh* (1924) L.R. 51 Ind.App. 332.
(*e*) *Barker* v. *Smark* (1841) 7 M. & W. 590.
(*f*) *Suffield* (*Lord*) v. *I. R. C.* [1908] 1 K.B. 865.
(*g*) Stamp Act, 1891 (53 & 54 Vict. c. 39), s. 88 (3).
(*h*) *Suffield* (*Lord*) v. *I. R. C.* [1908] 1 K.B. 865.
(*l*) Stamp Act, 1891 (53 & 54 Vict. c. 39), s. 87 (6).
(*m*) *Suffield* (*Lord*) v. *I. R. C.* [1908] 1 K.B. 865.
(*n*) Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 74. This duty will be considered in a later article.

to a collateral, auxiliary, additional or substituted security (other than an equitable mortgage) or by way of further assurance for any of the above-mentioned purposes, *i.e.*, for any of the purposes specified under (1) above, where the principal or primary security is duly stamped (*o*). It will be seen that an equitable mortgage (which is specially defined and separately provided for (*p*)) is excluded from this charge to duty as it was from the charge under (1). This charge to duty (which is at a much reduced and privileged rate) is not regarded by the Revenue as applicable to a security collateral to, substituted for, or by way of further assurance of, an equitable mortgage (or for that matter to any security except those specified under (1) above (*q*)). It may be questioned whether (except in the case of further assurance) this view is maintainable. Indeed, it is apparently the case that the principal security is duly stamped for this purpose if it does not require any stamp as coming under some exemption and thus not stamped at all (*r*). The rate of duty is 1s. for every £100 of the amount secured or (where the transfer of stock is secured) of the value of his stock (*s*), with a maximum of 10s. (*t*). An example of a collateral security is an instrument giving further security to secure an already secured debt. An example of substituted security is an instrument whereby (as is particularly common with the debentures or debenture stock trust deeds of brewery companies) one property (usually a public-house) is substituted for another as part of the security for the debentures or debenture stock (*u*); if a mortgage, by a debenture stock trust deed by which property is agreed to be mortgaged, is followed by an actual mortgage of the property, the latter is a charge by way of further assurance (*a*). Where new debentures or debenture stock are offered in place of like securities or stock, which are to be redeemed, the new are not for this purpose substituted securities, and they pay

(*o*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule I: Mortgage, Bond, Debenture, Covenant No. (2).

(*p*) See No. (3) below.

(*q*) And possibly also except a "marketable security," which, as will be seen in a later article, bears duty at the same rate as or a higher rate than a mortgage.

(*r*) See *British Italian Corpn.* v. *I. R. C.* [1921] W.N. 220, more fully reported in Sergeant on Stamp Duties, 2nd ed., p. 318, where, in connection with the corresponding provision under the heading Bond, Covenant, etc., in Stamp Act. 1891 (54 & 55 Vict. c. 39), Schedule I, this was assumed to be the case.

(*s*) See Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule I: Mortgage, Bond, Debenture, Covenant No. (2), and s. 87 (1).

(*t*) This maximum was imposed by Revenue Act, 1903 (3 Edw. 7, c. 46), s. 7, which was not retrospective: *Suffield (Lord)* v. *I. R. C.* [1908] 1 K.B. 865. The duty originally 6d. per £100 was doubled by the Finance Act, 1947 (10 & 11 Geo. 6, c. 35), s. 52, but the limit of 10s. was preserved by s. 55 (1).

(*u*) *Gartsides (Brookside Brewery)* v. *I. R. C.* (1900) 82 L.T. 686.

(*a*) *British Oil and Cake Mills* v. *I. R. C.* [1903] 1 K.B. 689.

duty at the higher rate appropriate to primary securities (*b*); and the same result follows if the old debenture is reissued under the statutory power (*c*). In these two cases there is not merely a substituted security but a substituted obligation. It is *a fortiori* if the obligation of a different borrower is substituted (*d*).

(3) *Equitable Mortgage*

An equitable mortgage, whether it is a primary or collateral security, is charged with a duty at the rate of 2s. per £100 of the amount secured (*e*), or (where the transfer of stock is secured) of the value of the stock (*f*). Not every equitable mortgage, as that term is usually understood, is an equitable mortgage for stamp duty purposes, the definition for this purpose being " an agreement or memorandum under hand only relating to the deposit of any title deeds or instruments constituting or being evidence of the title to any property whatever (other than stock or marketable security) or creating a charge on such property " (*g*). Thus, with the exception of charges on stock and marketable securities, it would appear that a charge on property created or evidenced by an instrument under hand is, and a charge or mortgage created or evidenced by an instrument under seal is never, an equitable mortgage. It is thought, for instance, that, although under earlier Acts a memorandum of a pledge required no stamp (*h*), a stamp is now required at the rate appropriate to an equitable mortgage (*l*). One practical difference between a charge under seal and a charge under hand only is that the statutory power of sale applies only to the former (*m*). It is no doubt possible to incorporate an express power of sale in a mortgage under hand. But it is not, of course, possible in an instrument under hand to confer power to convey the mortgaged property where that can only be done by deed, as with a legal estate in land (*mm*). It is thought that the Revenue would claim to stamp a mortgage under hand, conferring an effective power of sale at the higher rate appropriate to mortgages other than equitable mortgages. It is submitted, however, that there is no justification for this.

(*b*) *City of London Brewery* v. *I. R. C.* [1899] 1 Q.B. 121.
(*c*) Companies Act, 1948 (11 & 12 Geo. 6, c. 38), s. 90 (4).
(*d*) As in *Mount Lyell Mining Co.* v. *I. R. C.* [1905] 1 K.B. 161.
(*e*) Stamp Act 1891 (54 & 55 Vict, c. 39), Schedule I: Mortgage, Bond, Debenture, Covenant No. (3).
(*f*) *Ibid.*, s. 87 (1).
(*g*) *Ibid.*, s. 86 (2).
(*h*) *Re Attenborough and I. R. C.* (1855) 11 Ex. 461.
(*l*) But a pawnticket in the form in Schedule III to the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), is exempt from duty under s. 24.
(*m*) Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 101.
(*mm*) Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 52.

The definition of an equitable mortgage expressly excepts charges on stock and marketable securities. The main reason for this is that under section 23 of the Stamp Act, 1891 (*n*), certain mortgages of stock and marketable securities, which would be equitable mortgages but for the exception of such property from the definition, are to be stamped 6d. as agreements. To fall within this provision there must be a memorandum accompanying the deposit of a share warrant, or stock certificate to bearer, or foreign or colonial share certificate, or security transferable by delivery, as security for a loan, or making redeemable, or qualifying, a duly stamped transfer intended as a security for a loan of any registered stock or marketable security (*nn*). It should be noted that the accompanying transfer in the case of registered stock or marketable securities must be duly stamped, *i.e.*, unless the stock is exempt from duty or transfer it must be stamped 10s. There are in fact two ways of effecting a charge, by deposit of certificate and transfer. First, the memorandum (stamped 6d.) may be accompanied by a completed transfer naming the chargee or his nominee as transferee and stamped 10s. Under this, the chargee will not have himself registered as the holder unless he wishes to become mortgagee in possession. If he wishes to exercise his power of sale he must execute a fresh transfer naming himself or the nominee as transferor, stamped in accordance with the consideration, and this, combined with the first transfer, will enable him to have the purchaser registered. Where the constitution of the company requires share transfers to be under seal (*o*) this is the only method, as a person executing a deed may not leave blanks to be filled in by others later without its being redelivered. A second method is to adopt the same procedure but to leave the name of the transferee blank. It may be suggested that in order to obtain the benefit of section 23 one must stamp the blank transfer 10s. In any case the chargee can fill in his own or a nominee's name, stamp it 10s. if it is not already stamped, and then become mortgagee in possession, or he can fill in that of a purchaser if he exercises his power of sale. In the latter case the stamp duty must be made sufficient to cover the consideration (*p*). As (apart from section 23) a blank transfer need not be stamped until it is completed any necessary stamps may be affixed without penalty

(*n*) 54 & 55 Vict. c. 39.

(*nn*) *Ibid.*, s. 23 (2).

(*o*) As with companies under the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 14; *Powell* v. *London and Provincial Bank* [1893] 2 Ch. 555.

(*p*) See as to this procedure *Re Indo-China Steam Navigation Co., Ltd.* [1917] 2 Ch. 100. The observation of Eve J. in that case (*obiter* at pp. 106–7) that the registration of an improperly stamped transfer is not effective is not consistent with principle or with the observation of Lindley L.J. in *Powell* v. *London and Provincial Bank* [1893] 2 Ch. 555, at p. 560.

within thirty days after the blanks are completed. It is submitted as the better view that the blank transfer, so long as it remains a blank transfer, is duly stamped even for purposes of section 23 as requiring no stamp (*q*). But if this does not satisfy section 23 the charge itself must be stamped at the rate appropriate to a mortgage (not an equitable mortgage as it is a charge on stock or marketable securities).

(4) *Transfer of a mortgage*

Duty is imposed on the transfer, assignment, disposition or assignation of any mortgage, bond, debenture or covenant (except a marketable security) or of any money or stock thereby secured at the rate of 1s. for every £100 of the amount transferred (*r*). The rate was originally 6d. per £100 and was doubled by section 52 of the Finance Act, 1947 (*s*), and is the same for equitable as for other mortgages. If further moneys are secured by the instrument additional duty must be paid at the rate appropriate to a principal security (which may or may not be an equitable mortgage) for such additional money (*t*), but no additional duty is charged if the security is added to or improved (*u*). This duty is payable on all transfers, even those in which no beneficial interest passes (*a*), but there are certain provisions previously referred to which limit the duty to 10s. in certain cases, *viz.*, transfers to effect the appointment of new trustees (*b*), or the retirement of a trustee (*c*), or transfers as part of the operation of making a settlement where some other document used in effecting the same settlement bears settlement duty (*d*). If an instrument relating to land is stamped 10s. in accordance with these provisions, and will form part of the title, it is desirable that it should either be adjudicated or that it contain a recital or other statement showing the justification for

(*q*) *Cf. British Italian Corporation* v. *I. R. C.* [1921] W.N. 220; more fully reported in Sergeant on Stamp Duties, 2nd ed., p. 318, in which it was assumed that a document exempt from duty and not stamped, was "duly stamped" for the purposes of another provision of the Stamp Act, 1891.

(*r*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule I: Mortgage, Bond, Debenture, Covenant No. (4).

(*s*) 10 & 11 Geo. 6, c. 35.

(*t*) See Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule I: Mortgage, Bond, Debenture, Covenant No. (4), where this is stated in terms.

(*u*) *Ibid.*, s. 87 (3).

(*a*) *Martin* v. *I. R. C.* (1930) 15 A.T.C. 631. The reference in the judgment to a 6d. stamp must mean a stamp at 6d. per £100.

(*b*) *Ibid.*, s. 62, proviso. It will be appreciated that except for mortgages under a debenture or debenture stock trust deed mortgages do not automatically vest in an appointment of new trustees. See Trustee Act, 1925 (15 Geo. 5, c. 19), s. 40 (4).

(*c*) Revenue Act, 1902 (2 Edw. 7, c. 7), s. 9.

(*d*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 106 (3).

the 10s. stamp. By an extra-statutory concession transfers of collateral securities transferred together with the primary security are not charged more than 10s. (*e*). If this relates to land an adjudication stamp would seem to be essential for purposes of title.

At the other end of the scale a transfer of mortgage by way of gift is charged at £2 for every £100 of the value of the mortgage (commonly the same as the amount secured) on the ground that the Revenue may select the larger duty if either of two duties are applicable (*f*). It seems thus to be cheaper in stamp duty for a donor of a mortgage to donate a sum equal to the mortgage money and thereafter to sell the mortgage, provided that the gift and the sale are separate transactions. It is not easy to see why the reasoning in the case of voluntary conveyances does not apply likewise in the case of a transfer for value, but in fact the Revenue do not treat the transfer of a mortgage in consideration of the amount of the money secured as a conveyance on sale (*g*) and, if it were ever held to be dutiable as such, legislation would be necessary to rectify the very large number of titles that must depend on the present view being correct. It may be that the Revenue would adopt a different view of transfers closely resembling sales as where the consideration is not the same as the amount of the money secured. This might well happen with debentures of a company containing provisions which prevented them from being regarded as marketable securities.

Section 115 (2) of the Law of Property Act, 1925 (*h*), provides a method of transferring a mortgage by means of a receipt showing the money to have been paid by one not entitled to the immediate equity of redemption. Such a transfer needs the same stamp as any other transfer and is not sufficiently stamped with 2d. as a receipt (*l*).

(5) *Reconveyance of a mortgage*

Duty at the rate of 1s. per £100 of the total amount of money at any time secured is payable on the conveyance, release, discharge, surrender or renunciation of a mortgage (*m*). The original rate of 6d. per £100 was doubled by section 52 of the Finance Act,

(*e*) See Appendix to 93rd Annual Report of Commissioners of Inland Revenue (Cmd. 8109).
(*f*) *Anderson* v. *I. R. C.* [1939] 1 K.B. 341.
(*g*) See the argument of counsel in *Anderson* v. *I. R. C.* [1939] 1 K.B. 341, at p. 343.
(*h*) 15 Geo. 5, c. 20.
(*l*) *Ibid.*, s. 115 (5).
(*m*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule I: Mortgage, Bond, Debenture, Covenant No. (5).

1947 (*n*). By the express terms of the First Schedule to the Stamp Act, 1891 (*o*), the duty is paid on the total amount at any time secured, and not on the amount discharged by the instrument in question. On the other hand no duty is payable under this head on a partial discharge (*p*), though there may be liability for 2d. as for a receipt or 10s. as a deed (*pp*).

There is a wide range of charges (particularly equitable charges) which are effectually disposed of by a mere receipt for the money charged on the security. All that is needed to dispose of such charges is such a receipt which requires a stamp of 2d. if the amount is £2 or more (*q*) but which, if endorsed on the properly stamped instrument of charge (being an instrument that requires a stamp), does not even require duty as a receipt (*r*). It is suggested in Fisher and Lightwood on Mortgages (*s*) that this procedure, or the procedure of taking a separate receipt stamped 2d., is applicable to legal mortgages of land even effected by term of years, since by statute (*t*) such term ceases when the money is repaid. It is not, however, the practice to discharge mortgages of land in this way. More commonly the form of statutory receipt laid down by the Law of Property Act, 1925 (*u*), is used. This operates as a reconveyance and must be so stamped (*a*).

There are a number of provisions exempting reconveyances of mortgages (sometimes only if they are in a special form (*b*)) from liability to stamp duty. The most important of these are the provisions relating to the discharge of the mortgages of building societies (*c*), friendly societies (*d*), industrial and provident

(*n*) 10 & 11 Geo. 6, c. 35.

(*o*) 54 & 55 Vict. c. 39.

(*p*) *Munro* (*M'Kimmies Trustees*) v. *I. R. C.* (1895) 23 R. (Ct. of Sess.) 232.

(*pp*) There is an extra-statutory concession in force where 1s. per £100 on the amount repaid would be less than 10s., this lesser amount being accepted. See Appendix to 93rd Annual Report of the Commissioners of Inland Revenue (Cmd. 8107).

(*q*) A receipt given by a pawnbroker for money lent on pawn requires a 2d. stamp only if the profit made by the pawnbroker amounts to £2 or more: Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 15.

(*r*) *Firth & Sons* v. *I. R. C.* [1904] 2 K.B. 205 (receipt endorsed on floating charge).

(*s*) 7th ed., at p. 632.

(*t*) Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 116.

(*u*) *Ibid.*, s. 115 (1).

(*a*) *Ibid.*, s. 115 (5).

(*b*) The form provided by the Law of Property Act, 1925 (15 Geo. 5, c. 20) s. 115, is to be used for the purpose of the discharge of the mortgages of building, friendly or industrial and provident societies that are exempted from duty: *ibid.*, s. 115 (9).

(*c*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 41. See also Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), s. 8, which applies only to Building Societies under that Act.

(*d*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 33 (a).

societies (*e*), and mortgages granted by local authorities pursuant to the Small Dwellings Acquisition Act, 1899 (*f*). The reconveyance of a ship would presumably be exempt under No. (2) of the General Exemptions at the end of the First Schedule to the Stamp Act, 1891 (*g*).

VI Bond Covenant Duty

General

Ad valorem duty is charged on a wide selection of instruments which provide for the payment of periodical sums under the heading in the First Schedule to the Stamp Act, 1891 (*a*), " Bond, Covenant or Instrument of any kind whatsoever " which heading is divided into three sub-heads which will be separately considered. The duty is commonly described as " Bond Covenant duty " after the first two words of the heading and in token of the fact that there is no very apt name for it. The name " Periodical payment duty " would give a better idea of the subject-matter of the charge.

The duty is payable whether the instrument to be charged is under seal as with a bond or covenant or is under hand only (*b*). In consequence a wide range of commercial documents, as, for instance, contracts to purchase goods at a price payable by instalments (*c*), is subject to the duty. This is in marked contrast to the heading " Mortgage, Bond, Debenture, Covenant " (relating to agreements to pay single sums) where instruments under hand only are chargeable with duty only if they can be described as a mortgage or a debenture, so that a contract to purchase for a lump sum is not liable to any corresponding duty. In fact it is believed that the Revenue do not always claim Bond Covenant duty on purely commercial documents (*d*), but if they are liable to it they are not properly stamped without it. Perhaps the best-known class of document subject to this duty is the seven-year covenant commonly made in favour of charities and others by which wealthy or benevolent persons seek to arrange their affairs

(*e*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 44 (5), which applies only to Scotland. The corresponding section (s. 43) applying to England contains no such exemption.

(*f*) 62 & 63 Vict. c. 44. See Housing, Town Planning, etc., Act, 1919 (9 & 10 Geo. 5, c. 55), s. 49, proviso (b). The receipt must be in the form in *ibid.* Schedule IV.

(*g*) 54 & 55 Vict. c. 39.

(*a*) 54 & 55 Vict. c. 39.

(*b*) *National Telephone Co.* v. *I. R. C.* [1900] A.C. 1.

(*c*) *Durham County Electrical Power Distribution Co.* v. *I. R. C.* [1909] 1 K.B. 737, at p. 741; on appeal [1909] 2 K.B. 604; *British Italian Corporation* v. *I. R. C.* [1921] W.N. 220, more fully reported in Sergeant on *Stamp Duties*, 2nd ed., p. 318.

(*d*) See the statement attributed to an anonymous Solicitor-General referred to in Halsbury's *Laws of England*, 2nd ed., Vol. 16, p. 50, note (*s*).

so as to attract less tax. As will be seen, another important class of documents liable under this head is licences to use land, patents or other property on payment of "rent," royalty or other periodical sum.

Instruments subject to this duty are among those included in the table in section 15 (2) of the Act in respect of which an extra penalty of the amount of the duty is payable for stamping more than thirty days after execution, and the obligee is liable to a fine of £10 for failure to stamp.

The charge to duty is levied under three separate heads in the First Schedule to the Act which will be considered in the order in which they appear.

Primary securities

(1) The main head of the charge is Bond, Covenant, or Instrument of any kind whatsoever being the only or principal or primary security for any annuity (except on the original creation thereof by way of sale or security, and except a superannuation annuity) or for any sum or sums of money at stated periods not being interest for any principal sum secured by a duly stamped instrument nor rent under a lease or tack (*e*). Two effective rates of duty are imposed.

(i) **Payments for a definite period.** Where the payments are for a definite and certain period so that the total amount to be ultimately payable can be ascertained, the duty is the same as on a bond or covenant for that total amount, *i.e.*, as was seen under the heading "Mortgage, etc." at the rate of 5s. per £100 (*f*). It is thought that a bond for payment over a definite period determinable earlier on notice or on death is chargeable under this head and not under the indefinite period head next to be considered (*g*). Likewise it is thought that if the sum to be paid is a maximum (as for instance with the guarantee of a dividend which may not be required in full or at all) duty is chargeable under this head on the maximum. This would be in accordance with the contingency principle (*h*) but it cannot be said in these cases that the amount ultimately payable can be ascertained. It

(*e*) *Stamp Act*, 1891 (54 & 55 Vict. c. 39). Sched. I: Bond, Covenant, etc., No. (1). A somewhat special exemption from this duty under *ibid.*, s. 105, in case of settlements containing provision for certain periodical payments is considered in connection with settlements later.

(*f*) *Ibid.*, Sched. I: Mortgage, Bond, Debenture, Covenant No. (1). See *ante*, p. 28.

(*g*) See *Underground Electric Ry. and Glyn, Mills & Co.* v. *I. R. C.* [1914] 3 K.B. 210, *per* Scrutton J. at p. 221; on appeal [1916] 1 K.B. 306. *Cf. Mount-Edgcumbe (Earl)* v. *I. R. C.* [1911] 2 K.B. 24.

(*h*) See Vol. 17, pp. 388–9.

will be appreciated, however, that the charge of duty is stated by reference to the duty on a bond or covenant for the amount, and section 82 of the Stamp Act, 1891, shows clearly that such bonds or covenants are to be charged on the limit where the total amount thereby secured is in any way limited.

(ii) **Payments for an indefinite period.** Where the payments are for the term of life or any other indefinite period the rate is 5s. for every £5 of the annuity or sum periodically payable, the original rate of 2s. 6d. for every £5 (*l*) having been doubled by the Finance Act, 1947 (*m*). As stated above it is thought that a fixed period determinable with life or on any other event is not an indefinite period (*n*), and is not chargeable at this particular rate. A common example of an indefinite period occurs where payments are to be made until one or other party determines the agreement by notice (*o*). It has been held that, where the sum periodically payable is a fixed sum "per week" (*p*) or a "clear weekly sum" (*q*) or a "monthly sum" (*r*), duty is payable on the amount payable weekly or monthly as the case may be and not on the annual equivalent. It is therefore advisable to make the sum payable at short rather than long intervals in order to reduce the duty under this head. But care is needed or the payment may be held to be an annuity in which case duty is in terms levied on the amount of the annuity (*s*) or, failing that, it may be held that the stated period at which the sum is payable is a year and not some shorter selected period (*t*). The wise course is to trust to what have been called in another context the "incantations" (*u*) of the conveyancers and use one of the magic formulas that succeeded in the cases mentioned in notes (*p*), (*q*) and (*r*). It should be remembered that this point is only relevant in the case of payments for an indefinite period. The practitioner who has just discovered

(*l*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I: Bond, Covenant, etc., No. (1).

(*m*) 10 & 11 Geo. 6, c. 35, s. 52.

(*n*) See note (*g*), *supra*.

(*o*) As in *National Telephone Co.* v. *I. R. C.* [1899] 1 Q.B. 250; on appeal [1900] A.C. 1.

(*p*) *Clifford* v. *I. R. C.* [1896] 2 Q.B. 187.

(*q*) *Jackson* v. *I. R. C.* (1902) 87 L.T. 269.

(*r*) *Hennell* v. *I. R. C.* [1933] 1 K.B. 415.

(*s*) *Lewis and Lewis* v. *I. R. C.* [1898] 2 Q.B. 290. "Annuity" has not the same meaning as it has for purposes of income tax: *Commercial Union Ins. Co.* v. *I. R. C.* [1938] 2 K.B. 551.

(*t*) This is particularly likely to happen with quarterly or half-yearly payments as in *Underground Electric Ry. and Glyn, Mills & Co.* v. *I. R. C.* [1916] 1 K.B. 306.

(*u*) *Att.-Gen.* v. *Parr* [1924] 1 K.B. 916 at p. 931, *per* Atkin L.J.; *Parr* v. *Att.-Gen.* [1926] A.C. 239 at p. 273, *per* Lord Blanesburgh; *Re D'Avigdor-Goldsmid* [1951] Ch. 1038 at p. 1050, *per* Evershed M.R.; on appeal, *sub nom. D'Avigdor-Goldsmid* v. *I. R. C.* [1953] A.C. 347.

it for the first time is often so intoxicated with the sheer simplicity of cutting down the liability to tax in this way as to try to apply it to cases where the proposed payments are to be made for a fixed number of years. At best in such a case his labour in determining to the nearest penny the weekly equivalent of some annual payment will be wasted. Often though the result will be that the total amount ultimately payable will as a result exceed by a few shillings the round multiple of £100, that would have been the total if he had not tried to save any duty, and the duty, far from being reduced, is slightly increased.

The classes of document that are subject to duty under this head are legion. In fact it seems likely that as a result of what might fairly be called a chapter of accidents the range of documents that appears to be within the scope of this charge is much wider than the legislature originally intended. Possibly the House of Lords could now alter the position but no lower court can do so. In the result it would appear that almost any contract, commercial or otherwise, which provides for periodical payments or payments by instalments is within the charge. It has been said that the Revenue would not claim this duty on commercial contracts (*a*), but this is unsatisfactory as technically they may be improperly stamped all the same. The position calls for some amelioration by legislation or otherwise.

The first argument to limit the scope of the charge was the argument that the words of charge "being the only or principal or primary security" imputed some pre-existing obligation. This argument (which derives some support from the words in parentheses "except on the original creation thereof by way of . . . security") was rejected in the case of two agreements which came before the court together, the first for the use of telephonic communications at a rental, and the second for a licence to maintain automatic machines on railway premises at a rent (*b*), both of which agreements were held chargeable with the duty. It should be noted, however, that an instrument is not a security for the payment of a sum of money paid on the execution of the instrument, and where there is a series of sums, the first, which is paid on the execution of the instrument, should be ignored in assessing the duty. Again where, as with most insurance policies, a series of payments must be made if the payer is to secure the benefit of this contract, but the payer is at liberty to discontinue payments (at the price of forfeiting benefits) the instrument is not

(*a*) See the statement attributed to an anonymous Solicitor-General in Halsbury's *Laws of England*, 2nd ed., Vol. 16, p. 50, note (*s*).
(*b*) *Jones* v. *I. R. C.* [1895] 1 Q.B. 484.

a security for the periodic payments. The second argument put forward was that the charge was limited to instruments *ejusdem generis* with bonds and covenants, *i.e.*, to instruments under seal. This argument was rejected by the House of Lords in a case of an agreement for the hire of a private telephone line at a rental (*c*). The third argument was that it was limited to cases where the consideration for the payments is executed before the payments become due on the ground presumably that where the consideration is executory the instrument is security for such consideration as well as for the payments. This argument has commended itself to certain judges but they have felt forced by the decisions in footnotes (*b*) and (*c*) to reject it. Consequently an agreement for the supply of electricity (conceded in the case to be goods) partly at a fixed quarterly charge (*d*), and a contract for the purchase of a ship at a price payable by instalments (*e*), have been held to be securities. Some at least of the judges concerned in these last two decisions expressed reluctance in reaching their decisions (*f*). But all the judges concerned were unanimous in considering themselves bound by the earlier decisions, and in particular by the decision in the case of the *National Telephone Co.* v. *I. R. C.* (*g*) above referred to, to decide as they did. Although this last case went to the House of Lords it appears that the only point dealt with in this decision of the House was the question whether instruments under hand only were excluded from the charge to duty. It is thus arguable that the question whether the charge attaches to instruments under which the consideration is executory is open to reconsideration in the House of Lords. In any lower court it must be assumed in the meanwhile that all agreements for periodical payments or instalments fall under this charge to duty, or the charge on collateral securities about to be considered (*h*), unless some special reason can be found for excepting them. The following are exceptions or possible exceptions.

(*c*) *National Telephone Co.* v. *I. R. C.* [1900] A.C. 1.

(*d*) *Durham County Electrical Power Distribution Co.* v. *I. R. C.* [1909] 2 K.B. 604.

(*e*) *British Italian Corporation* v. *I. R. C.* [1921] W.N. 220 more fully reported in Sergeant on *Stamp Duties*, 2nd ed., p. 318. In this case the instrument in question was exempt from duty as a disposition of a ship under No. (2) of the General Exemptions at the end of Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I.

(*f*) Channell J. in *Durham County Electrical Power Distribution Co.* v. *I. R. C.* [1909] 1 K.B. 737 at p. 741; Rowlatt J. and Younger L.J. in *British Italian Corpn.* v. *I. R. C.* [1921] W.N. 220 as reported in Sergeant on *Stamp Duties*, 2nd ed., at pp. 322 and 328–9.

(*g*) [1900] A.C. 1.

(*h*) Under Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I: Bond, Covenant, etc., No. (2).

(a) There is an exception (*j*) in favour of annuities on the original creation thereof by way of sale or security. The exception is thus twofold. The "original creation of an annuity by way of sale" is an intelligible conception and it is quite clear that what is excepted is the common case of the purchase of annuity which is liable to *ad valorem* duty on the purchase price as a conveyance on sale (*k*). But the meaning of the "original creation of an annuity by way of security" is more obscure. It is generally assumed that it means an annuity in satisfaction of an obligation to repay a loan which is subject to duty on the amount of the loan as on a mortgage (*l*). But the words of the exception are not identical with the words imposing the duty as on a mortgage, and it is open to argument that the exception is wider than this. Indeed, unless the word "security" in the exception has a different meaning from the word "security" in the main charge to duty (which is not impossible (*m*)) there would seem to be an argument that with an annuity (though not with any other periodical payment) an instrument originating the obligation is not within the charge to duty.

(b) The Revenue do not, it is thought, claim duty on salaries or wages payable under contracts of service, at any rate where the object of the agreement is more to secure the services to the employer than to secure the remuneration to the employee. It is said that the reason for this is that as agreements for the hire of certain menial servants are exempt from the duty of 6d. on agreements (*n*), this exemption would be meaningless if all the time they are liable to Bond Covenant duty. There is a flaw in this argument as in fact the exemption would not be quite nugatory, but would save agreements for the hire of such servants for say the performance of a single task for a lump sum. Younger L.J. once expressed himself precluded by authority from accepting an equally plausible argument in relation to contracts for sale with the purchase price payable by instalments founded on sections 56 and 59 (4) of the Stamp Act, 1891 (*o*). Although in the old case

(*j*) See the words in parentheses in Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I: Bond, Covenant, etc., No. (1).

(*k*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 60.

(*l*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 87 (2).

(*m*) See *Littlewood* v. *George Wimpey* [1953] 2 K.B. 501, *per* Morris L.J. at pp. 522–3, where it was said that the word "liable" was used twice in one section of an Act of Parliament with different meanings.

(*n*) This argument was alluded to by Rowlatt J. in *British Italian Corpn.* v. *I. R. C.* [1921] W.N. 220 as reported in Sergeant on *Stamp Duties*, 2nd ed., at p. 322.

(*o*) 54 & 55 Vict. c. 39. See *British Italian Corpn.* v. *I. R. C.* [1921] W.N. 220 as reported in Sergeant on *Stamp Duties*, 2nd ed., at p. 328.

of *Mounsey* v. *Stephenson* (*p*) it was held that a service agreement was not within the corresponding charge under an earlier Act, it must be doubted whether the reasoning in this case is consistent with the more recent decisions above referred to on Bond Covenant duty. The whole question of the liability of service agreements to this duty is thus very unsatisfactory and the practical immunity which they appear to enjoy is mainly dependent on the attitude of the Revenue. It should be noted that where the paramount object of a service agreement appears to be the securing of payment of the remuneration, as with a contract of service for life or a contract providing for a pension, the Revenue claim Bond Covenant duty on the pension more particularly where it is to be paid, not to the employee, but to his widow or dependants (whether or not the latter is or are parties to the agreement). It is suggested that this distinction is not warranted by the terms of the Act and that either all or preferably none of such agreements should be regarded as subject to the duty.

(c) Rightly or wrongly Bond Covenant duty is not claimed by the Revenue on some instruments upon which a specific charge to duty is made which works out lower. Thus as has been seen under the head "Mortgage, Bond, Debenture, Covenant" duty is not charged on a policy of insurance even if under seal (*q*). Similarly agreements for the hire-purchase of goods coming within the terms of section 7 of the Finance Act, 1907 (*r*) (which applies to almost all the usual agreements for the hire purchase of goods) subject such agreements to the fixed duty of 6d. The argument is that (notwithstanding the rule that where an instrument is liable to two alternative duties the Revenue may exact the larger) there would be no point in this special provision for stamping such agreements if they were all along liable to Bond Covenant duty. This is faulty reasoning since, for instance, in 1907 (when the 6d. duty was imposed on them) hire-purchase agreements where the payments in the aggregate amounted to less that £10 would have been liable to Bond Covenant duty of only 3d., and that form of hire-purchase agreement under which the hirer is entitled to abandon the hiring, stop paying the instalments, and return the goods is not liable to Bond Covenant duty at all, there being no obligation to make the payments. In fact it seems almost certain that the legislature in enacting that hire-purchase agreements should be liable to a duty of 6d. intended to exclude such agreements from the exemption in

(*p*) (1827) 7 B. & C. 403.
(*q*) *Prudential Assurance Co.* v. *I. R. C.* [1904] 2 K.B. 658. See *ante*, p. 29.
(*r*) 7 Edw. 7, c. 13.

favour of contracts relating to the sale of goods and was not aware of the liability of such agreements to Bond Covenant duty.

Collateral securities

(2) The second head of charge to Bond Covenant duty is the charge in a Bond, Covenant or Instrument of any kind whatsoever being a collateral, auxiliary, additional or substituted security where the principal or primary instrument is duly stamped (*s*). The meaning of these terms has already been considered in connection with the duty under the head "Mortgage, Bond, Debenture, Covenant" (*t*), and it is under that head of duty that most of the instances have arisen. In fact the only common case where Bond Covenant duty is payable on a collateral, auxiliary, additional or substituted security is the case of a guarantee of a sum periodically payable (*u*). It is to be noticed that the principal security must be duly stamped though it seems that this requirement is satisfied if it is exempt from duty and unstamped (*a*). There must, however, be a principal security. A guarantee of the interest on stock to be created (*b*), or a guarantee of a preference dividend (the dividend itself not being a security at all), would attract duty at the rate appropriate to a principal security.

As with the principal security, there are two rates of duty, one applicable to the case where the total amount ultimately payable can be ascertained, and the other payable in any other case. There is no mention of the word "indefinite" but it is suggested that if the maximum ultimately payable can be ascertained the first of the two heads of duty applies. The rate of duty is declared to be the same as for a bond or covenant of the same kind (*i.e.*, a collateral bond or covenant) for such amount. This rate is 1s. per £100 and is charged by reference to paragraph (2) of the heading "Mortgage, Bond, Debenture, Covenant and Warrant of Attorney" in the First Schedule to the Stamp Act, 1891 (*c*), and this duty is accordingly limited to 10s. by section 7 of the Revenue Act, 1903 (*d*). The duty in the case of a collateral account where the total amount ultimately payable cannot be ascertained is 1s. per £5 of the amount periodically

(*s*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I: Bond, Covenant, etc., No. (2).

(*t*) See *ante*, p. 32.

(*u*) As in *British Italian Corpn.* v. *I. R. C.* [1921] W.N. 220 more fully reported in Sergeant on *Stamp Duties*, 2nd ed., p. 318.

(*a*) This was assumed in the case cited in the preceding note.

(*b*) *Underground Electric Ry. and Glyn, Mills & Co.* v. *I. R. C.* [1916] 1 K.B. 306.

(*c*) 54 & 55 Vict. c. 39.

(*d*) 3 Edw. 7, c. 46.

payable or of the annuity, the original duty of 6d. per £5 having been doubled by the Finance Act, 1947 (*e*). This raises identical problems to those raised and discussed in relation to primary securities. There is no 10s. limit applicable to this case.

Superannuation Annuities

(3) The remaining head of Bond Covenant duty is that charged on a grant or covenant for payment of a superannuation annuity which was expressly excluded from the main charge to duty (*f*). A superannuation annuity is defined as a deferred life annuity granted or secured to any person in consideration of annual premiums payable until he attains a specified age and so as to commence on his attaining that age (*f*). The rate of duty is 1s. for every £25 of the annuity, the original rate of 6d. per £25 having been doubled by the Finance Act, 1947 (*g*).

(*e*) 10 & 11 Geo. 6, c. 35, s. 52.
(*f*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I: Bond Covenant, etc., No. (3).
(*g*) 10 & 11 Geo. 6, c. 35, s. 52.

(*To be continued.*)

THE LAW OF RATING

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Introductory

The increasing burden of local rates levied for the purposes of local government and the imminence of revaluation of rateable property as the basis for determining the extent of liability to rates suggests that a short review of rating law may be opportune.

In this review we shall concern ourselves only with the rates which are now levied by the Common Council of the City of London the Metropolitan Borough Councils in the administrative County of London and the councils of county boroughs, boroughs, urban districts and rural districts elsewhere each as the designated " rating authority " for its " rating area."

These rating authorities now levy one rate called the " general rate " for all purposes for which they can levy a rate, save in rural districts where " special rates " are levied in addition to the general rate to meet certain specified expenses.

Such rates, it may be briefly said, are leviable upon persons who are in rateable occupation of rateable hereditaments at amounts calculated at so much in the pound on the rateable value of the rateable hereditament. Suffice it to say at this stage that each of these expressions has a significance or meaning in rating law which is the product of statute and judicial decisions, which it will be necessary to examine in greater detail in their general significance and with regard to special cases.

To any study of current rating law some reference to its history is essential, and particularly is this necessary in considering judicial decisions of the past which, subject to statutory modification, form part of the modern law.

The Statute of Elizabeth, 43 Eliz. c. 2, is to be regarded as the origin of subsequent rating law, parts of it in abbreviated form still being in force. By section 1 of this Act the overseers of the poor of each parish were " to raise weekly or otherwise by taxation of every inhabitant parson vicar and other, and of every occupier of lands, houses, tithes impropriate propriations of tithes, coal mines or saleable underwoods in the said parish, in such competent sum and sums of money as they shall think fit . . ." for dealing with the

poor of the parish. Rating practice and judicial decisions established that this wording imposed on the inhabitants as such, that is persons residing within the parish, a liability in respect of personal property eventually restricted to stock in trade and ships situate in the parish (*a*). This liability as an inhabitant for personal property was finally abolished in 1840 (*b*).

No precise basis of assessment for liability on the occupier of lands and houses was laid down by the Statute of Elizabeth, and, apart from rating practice and restrictions gradually imposed by the courts, it was not until the Parochial Assessment Act, 1836, that such a basis was provided. That Act by section 1 provided:

"No rate for the relief of the poor . . . shall be allowed . . . which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say of the rent at which the same might reasonably be expected to let from year to year, free of all tenants rates and taxes and tithe commutation rent charge if any and deducting therefrom the probable annual average cost of the repairs insurance and other expenses, if any, necessary to maintain them in a state fit to command such rent." In rating parlance this means the estimated rental which the hypothetical tenant would pay on the basis specified, not necessarily the actual rent paid by the actual tenant or occupier to his landlord.

Subject to certain exceptions created by statute this basis remains today.

The rateable values which now operate are those stated in valuation lists, the law governing the preparation, amendment and revision of which is now largely contained in the Local Government Act, 1948. Consideration of these matters together with provisions for collection of rates which are largely of earlier origin, we defer to the later sections of our review.

Rateable Occupation

A person in rateable occupation of land is personally liable to pay rates during the period of his occupation. "The poor rate is not a tax on the land, but a personal charge in respect of the land," *per* Lord Mansfield in *Rowls* v. *Gels* (1776) 2 Cowp. 451. No occupier of land can be made liable for rates left unpaid by his predecessor, whilst, on the other hand, distress can be levied against a ratepayer's goods on the land for which he is rated, or elsewhere. It is not strictly accurate, although it is common, to speak of "rateable land." "The occupier, not the land, is rateable: but,

(*a*) *R.* v. *Church Wardens of Andover*, 2 Cowp. 550; *R.* v. *Shephard*, 1 B. & Ald. 109; *R.* v. *Lumsdaine* (1839) 10 A. & E. 157.

(*b*) Poor Rate Exemption Act, 1840.

the occupier is rateable in respect of the land which he occupies " (*c*). Certain types of land are, however, totally exempt from rating and these will be considered hereafter. There is no statutory definition of " the occupation " which founds liability to rates, but it appears from the authorities that a person is liable to be rated if—

(a) he is in occupation of land; and
(b) the occupation is beneficial; and
(c) the occupation is sufficiently permanent.

(A) *Occupation*

Occupation is essentially a question of fact and carries with it the notion of use and enjoyment of the land. The acts of use and enjoyment which constitute occupation necessarily vary with the nature of the hereditament. " Occupation which is the basis of liability, necessarily varies with the nature of the rateable subject-matter. The acts necessary to establish occupancy of a dwelling-house may be very different from those which might be required to establish occupation of a non-habitable hereditament," *per* Collins M.R. in *R.* v. *Melladew* [1907] 1 K.B. 192 at p. 200. Thus a dwelling-house is usually occupied by being lived in, and if quite empty would not normally be regarded as being occupied (*d*). On the other hand, a warehouseman is in occupation of a warehouse though it be completely empty, so long as he holds it ready to store customers' goods whenever they wish to deposit them (*e*).

The general rule stated in Ryde on *Rating*, 9th ed., p. 16, and judicially approved in *Robinson* v. *Taylor* [1948] 1 K.B. 562 at p. 569 is as follows: " To constitute a person the ' occupier ' of land, he must have ' a *de facto* possession, that is to say, actual physical prehension of the particular portion of the soil, to the substantial exclusion of all other persons from participating in the enjoyment of it ' " (*f*).

It is clear that " occupation " is not to be equated with " title," nor yet with " possession," by which is meant the right to maintain an action of trespass. " Whether a person is an occupier or not within the rating law is a question of fact and does not depend upon legal title," *per* Lord Herschell in *Holywell Union* v. *Halkyn District Mines Drainage Co.* [1895] A.C. 117 at p. 125. Thus a " squatter " although liable to be evicted by the owner, and despite

(*c*) *Per* Lord Russell, *Westminster Council* v. *Southern Ry.* [1936] A.C. 511 at p. 529.
(*d*) *Infra*, p. 52.
(*e*) *Infra*, p. 53.
(*f*) Part of the definition is taken from Clerk and Lindsell on *Torts*, 8th ed., p. 896.

his lack of title or interest in the land, is liable to be rated, provided that his occupation is "as a settler not as a wayfarer" (*g*). In *R.* v. *Bell* (1798) 7 T.R. 598 Bell, who was the occupier of a wagon way running over land owned by the Dean and Chapter of Durham, was held rateable despite the fact that the Dean and Chapter had no power to alienate the land or any part of it so that Bell had no title to the wagon way.

It does not follow, however, from the above that title is always irrelevant to the issue of occupation. The rule appears to be that if the person sought to be rated has such visible use and enjoyment of the land as clearly to constitute occupation, then his absence of title is immaterial. If, however, his acts of use and enjoyment are occasional and ambiguous, then the fact that he has title to the land may be relied upon to establish his occupation. Comparatively slight acts of use by an owner in possession will support the inference that he is in occupation. "An owner in possession is prima facie occupier unless the occupation is shown to be in someone else. . . . Where the alleged occupier is a recent purchaser, one test is whether being the owner and having put no other person into possession, he has such use of the land as it is reasonable to infer that he intended to obtain when he bought it . . ." : *per* Buckley L.J. in *Liverpool Corporation* v. *Chorley Union* [1912] 1 K.B. 287 at p. 288.

An owner in possession of land who does not intend to use it in any way until the happening of some future uncertain event is not to be treated as in occupation. In *Associated Cinema Properties, Ltd.* v. *Hampstead Borough Council* [1944] 1 K.B. 412, the appellants took a lease of houses intending to use them as offices only if the offices they were then using became unfit by reason of war damage or otherwise (*h*). The Court of Appeal held that so long as they retained the houses only as reserve offices they were not rateable. "Intention is relevant only when it goes to show present occupation and user. . . . It is never true to say that a mere intention to occupy in hypothetical circumstances which may never come into existence is equivalent to occupation" (*i*).

A person may be rateable as an occupier although he cannot maintain trespass. A person who enters land under an agreement as a licensee to excavate minerals will be rateable if the rights

(*g*) *Per* Lush J., *R.* v. *St. Pancras Assessment Committee* (1877) 2 Q.B.D. 581 at p. 589.

(*h*) The fact that they were lessees and not owners is for this purpose immaterial.

(*i*) *Per* du Parcq L.J. p. 417: The decision in *Borwick* v. *Southwark Corporation* [1909] 1 K.B. 78 can only be supported on the narrow ground that the premises were being used as a storehouse for shafting and benches.

granted to him involve a physical possession of the soil and are exclusive rights (*k*). " It is the substance of the transaction rather than the form which determine the question whether . . . an exclusive occupation exists . . .": *per* Lopes L.J. in *Rochdale Canal Co.* v. *Brewster* [1894] 2 Q.B. 854, at p. 858. Conversely the intending vendor of an empty and unused building is in possession and can maintain trespass until he sells, but he is not normally to be regarded as in occupation.

Differing types of property, however, give rise to differing problems of occupation and some of these must now be considered with reference to decisions which are not always easy to reconcile.

Dwelling-houses

A dwelling-house which is used and enjoyed as such is clearly occupied and presents no difficulty. Ordinarily it is equally clear that the owner of an empty private dwelling-house is not in occupation of it. It has been suggested in *Liverpool Corporation* v. *Chorley Union* [1913] A.C. 197 at p. 211, that an empty house is an exceptional case by virtue of the express mention of " houses " in section 1 of the Poor Relief Act, 1601. " When the statute . . . enacts that the occupier of a house should be rated, it must mean that the person to be rated shall occupy the house as a house, . . . that he shall use . . . it . . . for such . . . purpose as houses may reasonably be devoted to; and that, as a vacant house is not used for any of these purposes, it is not occupied as a house within the meaning of the statute " (*l*). " If, however, [the owner] furnishes it and keeps it ready for habitation whenever he pleases to go to it, he is an occupier, though he may not reside in it one day in a year," *per* Lush J. in *R.* v. *St. Pancras Assessment Committee* (1877) 2 Q.B.D. 581, at p. 588.

Problems have arisen in regard to houses which are vacant for part of the year. In *Gage* v. *Wren* (1903) 67 J.P. 32, the lessee furnished a house at a seaside resort and ran it as a boarding house in the summer months. She did not reside there herself. In the winter months she removed all the furniture, apart from a few fixtures, intending to resume business the following spring.

(*k*) *Kittow* v. *Liskeard Union* (1874) L.R. 10 Q.B. 7; *Roads* v. *Trumpington* (1870) L.R. 6 Q.B. 56; *cf. R.* v. *Trent and Mersey Navigation* (1825) 4 B. & C. 51.

(*l*) The correctness of this view was expressly reserved by Lord Russell in *Townley Mill (1919), Ltd.* v. *Oldham Assessment Committee* [1937] A.C. 419, 433. In view of the decision in *Associated Cinema Properties, Ltd.* v. *Hampstead Borough Council* [1944] 1 K.B. 412 it is submitted that the wording of the Poor Relief Act, 1601, may provide an additional reason why the owner of a vacant house is not rateable; such an owner's position is in accordance with the general principles governing rateability.

It was held that she was in rateable occupation throughout the whole year. "She wanted to carry on the business of a lodging-house keeper at a seaside place. . . . The occupation and the carrying on of the business which was contemplated by the respondent would best and most profitably be carried on if she was there during the busy season and went away and shut the house up . . . during the rest of the time . . . there was a beneficial occupation of the house all the time . . ." (*m*). In *Bayliss* v. *Chatters* [1940] 1 All E.R. 620, the owner of six bungalows let them furnished from time to time, but they all became vacant for over a year. He removed the furniture from four houses and turned the water off, the fifth he used to store the furniture, and the sixth as a show bungalow. He was at all times ready to let the bungalows furnished or unfurnished. It was held by the Divisional Court that these facts did not justify reversing a finding by the magistrates that the owner was in rateable occupation of all six bungalows. This decision, so far as the four empty bungalows are concerned, appears difficult to reconcile with the judgment of Collins M.R. in *R.* v. *Melladew* [1907] 1 K.B. 192, in which he said: "In the case of the owner seeking to find a tenant . . . no assertion of occupation is involved. . . . In the case of an owner who tries to let the intention is not to occupy" (*n*).

Warehouses

On a number of occasions the courts have considered whether empty warehouses were occupied. In the case of *R.* v. *Melladew* [1907] 1 K.B. 192, the owner of a vacant warehouse removed his weights and measures, cut off the water supply and notified the rating authority that the warehouse was not in use. However, he posted bills advertising this warehouse space and was at all times ready to reopen if business justified it. It was held that the owner remained in occupation. The test in such a case is: "Has the person to be rated such use of the tenement as the nature of the tenement and of the business connected with it render it reasonable to infer was fairly within his contemplation in taking or retaining it? In many trades, and certainly in a warehouseman's, the trader must necessarily contemplate the occupation for considerable periods of part of his premises as spare room" (*o*). If, however, it is established that there is a bona fide intention

(*m*) *Per* Darling J., p. 34; see also *Mayor of Southend-on-Sea* v. *White* (1905) 65 J.P.J. (seasonal shop).

(*n*) At p. 202. The attention of the Divisional Court does not appear to have been drawn to this judgment.

(*o*) *Per* Farwell, L.J. at p. 203.

by the warehouseman not to use a particular warehouse during a rating period, he will be treated as having gone out of occupation (*p*). The difference is between giving up the use of a warehouse for business purposes even temporarily, and failing to use it because business is slack (*q*).

Where factories become idle for one reason or another, but machinery and other chattels are left on the premises, the factory will be rateable as a storehouse for such chattels and machinery. The factory owners retain their occupation by storing such equipment there (*r*). It should be noted, however, that section 24 of the Rating and Valuation Act, 1925, requires that no account shall be taken of plant and machinery in or on a hereditament unless it is within one of the classes specified in the Third Schedule to the Act, when it shall be deemed to be part of the hereditament. Where, therefore, the only equipment left on the premises is within the specified classes, it may well be that the premises must be treated as unoccupied (*s*).

Land Over Which the Public has Rights

If the rights of the public over land are so extensive as to be inconsistent with any use or enjoyment by persons having the title to the land, then such persons will not be regarded as occupiers. Land may, however, be devoted to "public purposes" without conferring upon members of the public a general right of access, *e.g.*, land used as a sewage farm. In such cases there is no doubt that the authority is in occupation of the land, the only question is whether such occupation is beneficial. If the owner of the land is not in occupation at all, it must be not merely because the land is devoted to public purposes, but because it can be said to be occupied by the public at large. Thus "a road is vested in someone but, if a public road, there is no occupation of it any more than of a milestone . . ." (*t*).

In *Hare* v. *Overseers of Putney* (1881) 7 Q.B.D. 223, the Metropolitan Board of Works bought Putney Bridge which had formerly been a toll bridge and were required by statute thereafter

(*p*) *Overseers of Bootle* v. *Liverpool Warehousing Co.* (1901) 85 L.T. 45 (on the facts it is perhaps surprising that such an intention was established).

(*q*) See also *Hewson, Chapman & Co.* v. *Grimsby County Borough Council* (1953) 46 R. & I.T. 703 (timber sheds empty but ready for use).

(*r*) See *Staley* v. *Castleton Overseers* (1864) 5 B. & S. 505; *Harter* v. *Salford Overseers* (1865) 6 B. & S. 591; *Borwick* v. *Southwark Corporation* [1909] 1 K.B. 78.

(*s*) See *Townby Mill* (1919) *Ltd.* v. *Oldham Assessment Committee* [1937] A.C. 419.

(*t*) *Per* Lord Halsbury *Lambeth Overseers* v. *L. C. C.* [1897] A.C. 625 at p. 630.

to keep the bridge open to the public free of charge. It was held that the Board were not in occupation of the bridge, or if they were in occupation, such occupation was not beneficial.

This principle was extended to apply to a public park in *Lambeth Overseers* v. *L. C. C.* [1897] A.C. 625 (the *Brockwell Park Case*). The London County Council in pursuance of a statutory power, but not in discharge of a statutory duty, purchased a park which the statute required the Council to hold for the perpetual use and recreation of the public. Lord Herschell said (*u*) : " I am not satisfied that the County Council is an occupier of the park for rating purposes, though the legal possession is no doubt vested in them. They seem to me to be merely custodians or trustees to hold it and manage it for the use of the public."

The fact that an authority owning and managing a park or open space excludes the public at night, lets out pitches for games, and occasionally charges for admission, does not necessarily prove that the rights of the public are not exclusive so as to make the authority an occupier. The question whether such powers of management are merely ancillary to the dedication of the land to the public, or whether they so limit the rights of the public as to give the authority a use and enjoyment of the land tantamount to occupation, " is one of degree and therefore a matter of fact " (*v*). Further, the fact that the owning authority has power under section 29 of the Settled Land Act, 1925, and section 42 of the Town and Country Planning Act, 1947, to convey a good title to the land and to appropriate it to other purposes does not prevent the dedication of the land to the public from being sufficiently permanent to exclude occupation by the authority. " Such powers are powers to be exercised by the local authority as trustees and can therefore only be exercised, if at all, in conformity with the trusts on which it may hold the relevant land " (*w*). In *Burnell* v. *Downham Market Urban District Council* [1952] 2 Q.B. 55, the Court of Appeal expressed the view *obiter* that the reasoning in the *Brockwell Park* case was " equally applicable to the trustees of land held for title purposes under a valid charitable trust created irrevocably by deed " (*x*).

(*u*) p. 631.

(*v*) See Evershed M.R. in *Burnell* v. *Downham Market U. D. C.* [1952] 2 Q.B. 55 at p. 66. See also *Liverpool Corporation* v. *West Derby Assessment Committee* [1908] 2 K.B. 647.

(*w*) *Per* Evershed M.R. at p. 65. But *cf. London Playing Fields* v. *South West Essex Assessment Committee* (1930) 144 L.T. 233, where the owners held the land as playing fields for the public not under compulsion of law but by voluntary act and were held to be occupiers.

(*x*) At p. 65. A mere restrictive covenant would not, it is submitted, be sufficient.

There appears to have been no case to date where it has been successfully contended that the owner of a building other than a building ancillary to a park is not in occupation of it by reason of its dedication to the public. In *Liverpool Corporation* v. *West Derby Union (No. 1)* (1905) 65 J.P. 277, the corporation were held to be in rateable occupation of a house used as a public library, principally upon the ground that the corporation could at any time remove the library to another site (*a*).

It should be noted that in nearly all the cases concerning land over which the public have rights the question whether any occupation that existed was beneficial, was also considered. This question is considered below.

Occupation by a Servant or Agent

A servant who occupies land for his master's purposes is not himself rateable. His occupation is deemed to be the occupation of the master who alone is liable to be rated. In *Bertie* v. *Walthamstow Overseers* (1904) 68 J.P. 545, a foreman was installed in a house upon his employer's building estate to supervise building work on the estate. The employer was held rateable for the house by reason of the foreman's occupation of it. Where, however, the servant is a mere caretaker "... to protect the premises from injury and damage and to facilitate the entry of the owners or any persons calling on their behalf" (*b*), and does not perform any functions towards the beneficial use of the premises, it is not the practice to rate even the master. In such a case the caretaker's occupation is not beneficial from the master's point of view (*c*).

It does not follow however that, whenever a servant occupies premises owned or leased by his master, the master will be rateable. If the servant is in occupation, the better to discharge his duties as a servant and for the master's purposes, then the master will be rateable. If, however, the servant occupies premises as part of his remuneration, and as a benefit to himself rather than as a service to his master, he will be rateable and not the master. In *R.* v. *Catt* (1795) 6 T.R. 332, the master of a free school had assigned to him by his employers a house and garden "for the habitation and use of himself and his family freely," and was held rateable in respect of it. Where a servant has the use of part only of premises comprising one hereditament, then he cannot be rateable for that hereditament, and if anyone is rateable it will

(*a*) See also the note of *L. C. C.* v. *Fulham Borough Council*, 115 J.P. 532 (park pavilion used as a British Restaurant).
(*b*) *L. C. C.* v. *Hackney Borough Council* [1928] 2 K.B. 588, at p. 597.
(*c*) *Bertie* v. *Walthamstow Overseers* (1904) 68 J.P. 545 at p. 546.

be the master, irrespective of whether the servant occupies as an obligation or as a benefit (*d*).

(B) *Beneficial Occupation*

A person who is in occupation of land is not rateable unless his occupation is beneficial. If an occupier is liable to be rated, then the basis of assessment of that liability, that is, the rateable value, is, in general, the sum estimated to represent the rent at which the hereditament might reasonably be expected to let from year to year. If the hereditament cannot reasonably be expected to be let at any rent at all, because there is (for one reason or another) no demand for such a hereditament, then the occupier is not in beneficial or rateable occupation. "... Occupation to be rateable must be of property yielding or capable of yielding a net annual value, that is to say a clear rent over and above the probable annual cost of repairs, insurance and other expenses, if any, necessary to maintain the property in a state to command such rent. It is in this sense that I understand the words 'beneficial occupation' ...": *per* Lord Westbury in *Jones* v. *Mersey Docks* (1865) 11 H.L.C. 443, at p. 501.

Beneficial occupation has also been defined as occupation which is of value to the occupier. "It is clear that there can be no valid rate unless the occupation be such as to be of value ..." (*e*). If the occupation is of value to the occupier, then he would himself be prepared to give a rent for it, and since it is quite proper to consider the actual occupier as the hypothetical tenant, the land will have a rateable value. In *Liverpool Corporation* v. *Chorley Union Assessment Committee* [1913] A.C. 197, the Liverpool Corporation had purchased a large area of agricultural land and moorland which formed the gathering ground for the corporation's reservoir and waterworks. In order to minimise the risk of pollution the corporation limited the use of the land to sporting and afforestation. The corporation was admittedly in occupation (*f*) and the House of Lords held that the occupation was beneficial. As Buckley L.J. said in the Court of Appeal (*g*): "It was worth [the corporation's] while to pay a large sum of money for the land to ensure the absence of a population which might (a) contaminate or (b) consume. ... They are enjoying the benefit of the land. ..." If the occupation is of no value to the actual

(*d*) *R.* v. *Field* (1794) 5 T.R. 587.
(*e*) *Per* Lord Blackburn in *Jones* v. *Mersey Docks* (1865) 11 H.L.C. 443 at p. 462.
(*f*) See the judgment of Lord Atkinson at p. 212.
(*g*) [1912] 1 K.B. 270, 288.

occupier, then the occupier is not rateable. In *L. C. C.* v. *Hackney Borough Council* [1928] 2 K.B. 588, the London County Council were owners and occupiers by their caretaker of a disused and empty industrial school. It was held by Wright J. that since the premises were neither being used, nor capable of being used for any beneficial purpose of the London County Council in their empty condition, there was no beneficial occupation.

Unprofitable Occupation

It is now clearly established that beneficial occupation does not mean, as was at one time thought, financially profitable occupation. It is not necessary in order to make the occupier of land rateable to prove that the land either yields or is capable of yielding a financial profit to him. The owner of a dwelling-house who resides in it makes no financial gain from it; indeed he makes a loss, but his occupation is rateable because it is of value to him as providing a residence. Thus in *R.* v. *Parrot* (1794) 5 T.R. 593, the lessee of coal mines was making a loss on every ton of coal mined but was nevertheless held rateable. Kenyon C.J. said (*h*): "Their objection is that they have made an unprofitable bargain with their lessors, but we cannot examine into that. . . ."

No serious attempt has indeed ever been made to equate "beneficial occupation" with "profitable occupation" in the case of private persons occupying land for their own purposes. Where, however, land was used for charitable purposes or was occupied for public purposes under statutory provisions, it was commonly held in the early nineteenth century that those who owned and used the land could not be in rateable occupation unless the land yielded some financial profit to them (*i*). This fallacy was linked with a distinct and undoubtedly correct principle, namely, that the Crown, not being mentioned in the Poor Relief Act, 1601, is not bound by it, and is not liable to be rated for its occupation of land. In the result it was generally held that land devoted to public purposes, even if those purposes were local and not the purposes of the Crown itself, could not be rateably occupied.

This view was greatly weakened by *Jones* v. *Mersey Dock* (1865) 11 H.L.C. 443. The Mersey Dock Trustees occupied docks and received dues and charges which exceeded the running expenses. All profits were, however, by the terms of the special Act under which the Trustees held the canal, required to be applied to

(*h*) At p. 596.

(*i*) See *R.* v. *Waldo* (1783) Cald. 358; *R.* v. *St. Giles of York* (1832) 3 B. & Ad. 573 (charities); *R.* v. *Salters Load Sluice* (1792) 4 T.R. 730; *R.* v. *Sculcoats* (1810) 12 East. 40 (public purposes).

specified purposes with the result that no gain accrued to the Trustees. It was held by the House of Lords (i) that the exemption of the Crown from rateability did not extend to other persons who occupied lands for purposes beneficial to the general public; and (ii) that the Trustees' occupation was beneficial although none of the profits accrued to them. The distinction between " benefit " and " profit " was not, however, clearly drawn in all of the judgments (*k*), and it was possible to take the view that had no profit at all been made from the occupation, the Trustees would not have been rateable.

The fallacy that occupation without profit was not beneficial persisted, particularly with regard to sewers, until 1911. In *R.* v. *Metropolitan Board of Works* (1868) L.R. 4 Q.B. 15, the Board of Works occupied a pumping station, engine house, and a main sewer which lay under the public highway. The court held the Board rateable in respect of the station and engine house on the ground that had the Board not owned such premises they would have had to rent them and could find a tenant for them were they minded to let them. Although it was equally true that the Board would have had to rent the sewer had they not owned it, the Board were held not rateable for the sewer since their occupation yielded no profit, actual or potential (*l*). Twenty-five years later, however, the House of Lords in *L. C. C.* v. *Erith and West Ham* [1893] A.C. 562, held the London County Council rateable for an outfall sewer erected in an embankment on the land. Lord Herschell, delivering the judgment of the House, said (*m*): " . . . I must demur to the view that the question whether profit (by which I understand is meant pecuniary profit) can be derived from the occupation by the occupier, is the criterion which determines whether the premises are rateable. . . ." He also expressed the view that nothing said in *Jones* v. *Mersey Docks* (*supra*) justified the view " that it is essential to rateability that a particular occupier of the land can make a pecuniary profit by the use to which he is putting it. It is . . . rateable whenever its occupation is of value " (*n*). Nevertheless the House did not overrule *R.* v. *Metropolitan Board of Works* (*supra*), and it was not until the decision in *West Kent Main Sewerage Board* v. *Dartford Union* [1911] A.C. 171, that it was finally established that the occupiers

(*k*) See Lord Blackburn at p. 463.

(*l*) See also *Metropolitan Board of Works* v. *West Ham* (1870) L.R. 6 Q.B. 193 (surface sewer held not rateable); overruled in *L. C. C.* v. *Erith and West Ham* [1893] A.C. 562.

(*m*) At p. 591.

(*n*) At p. 585.

of land used for sewers, whether upon or below ground, are rateable in respect of them, so long as the occupation is of value.

A number of cases concerned with beneficial occupation use the expression "land struck with sterility." This expression was first used in *West Bromwich School Board* v. *Overseers of West Bromwich* (1884) 13 Q.B.D. 929, 943, where Brett L.J. said: "If land is by law struck with sterility when in any and everybody's hands so that no profit can be derived from the occupation of it, it cannot be rated. . . ." Lord Herschell in *L. C. C.* v. *Erith and West Ham* (*supra*) was prepared to agree that land could properly be described as "struck with sterility" whenever "whether by law or by its inherent conditions its occupation is and would be of no value to anyone" (*o*). Thus in the *Brockwell Park Case* [1897] A.C. 625, it was held that even if the council were occupiers, their occupation was not beneficial. "No tenant would give anything for an occupation which would not give him a capacity to earn more than the rent which he is called upon to pay for it and, if the statute, as in this case, prevents him from earning anything, there can . . . be no rateable occupation. . . . Once it has been found, as in this case, that the occupation cannot as a matter of law be a beneficial occupation, there is an end of the question" (*p*).

Profitable Occupation

If the occupation of land is in fact profitable to the occupier, then, although the occupation is for public purposes, the occupier will be rateable, irrespective of whether the occupation is undertaken voluntarily or in pursuance of a statutory duty. In *North Riding of Yorkshire Valuation Committee* v. *Redcar Corporation* [1943] K.B. 114, the Redcar Corporation had acquired a part of the foreshore and sand dunes at Redcar, under powers conferred by the Public Health Act, 1875, for public walks and pleasure grounds. The corporation erected on the land a swimming pool, boating lake, concert hall with two lock-up shops, putting course, and car park, and charged the public for admission to these parts of the land. The total income from these parts was £11,512 18s. 9d. and the total expenditure £11,034 14s. 2d., so that the corporation enjoyed a profit. In these circumstances the corporation were held rateable in respect of the parts of the land so used. Caldecote C.J. said (*q*): "It is not difficult to imagine a substantial rent being

(*o*) At p. 591.
(*p*) *Per* Lord Halsbury at p. 630. See also *Hare* v. *Overseers of Putney* (1881) 7 Q.B.D. 223.
(*q*) At p. 129.

paid either by the corporation or by some amusement contractor for the privilege of being able to earn the very large revenue which the corporation has in the past received," and Cassels J. added (*r*) : " Redcar Corporation are using these lands for the public benefit . . . but the occupation is of value to the corporation."

(C) *Permanent Occupation*

" Rateable occupation . . . must have some degree of permanence : a mere temporary holding of land will not constitute rateable occupation " : *per* Lord Russell in *Westminster Council* v. *Southern Ry.* [1936] A.C. 511, at p. 529. An occupier of land will be rateable if his occupation in fact lasts for a sufficiently long period, regardless of the nature of his legal title to occupy. Thus the occupants of " grace and favour " apartments at Hampton Court (*s*) have been held rateable, as have the occupants of almshouses (*t*), although both might be required to leave at any time. In *Electric Telegraph Co.* v. *Salford Overseers* (1855) 11 Ex. 181, the telegraph company was held rateable in respect of its poles by the railway side, although the railway company was entitled at any time to call for their removal. In *J. Laing & Son, Ltd.* v. *Kingswood Assessment Committee* [1949] 1 K.B. 344, a building contractor was held rateable in respect of huts erected on a building site and used by his workmen for a period of two years.

The question of permanence also arises in regard to the rateability of things affixed to the soil. " Where the subject of occupation is not a surface area . . . but only a small portion of the soil, so much of it as contains a post, a pipe, or a rail, the element of permanence or its absence is shown by the way in which the post, etc., is connected with the soil " : *per* Lush J. in *R.* v. *St. Pancras Assessment Committee* (1877) 2 Q.B.D. 581, at p. 589. A telephone company has been held rateable in respect of telephone wires bracketed to buildings (*u*), and a telegraph company in respect of its telegraph poles (*a*). The owners of a floating dock which moves from one mooring place to another have, on the same principle, been held not rateable (*b*). In such cases continuous affixation to the soil is necessary to found rateability (*c*).

(*r*) p. 136. Cassels J. also adopted the explanation of the *Brockwell Park* case suggested by Channell J. in *Sir John Soanes Museum* v. *St. Giles and St. George* (1900) 83 L.T. 248, 251.

(*s*) *R.* v. *Ponsonby* (1842) 3 Q.B. 14.

(*t*) *R.* v. *Green* (1829) 5 B. & C. 203.

(*u*) *Lancashire Telephone Co.* v. *Manchester* (1884) 14 Q.B.D. 267.

(*a*) *Electric Telegraph Co.* v. *Salford Overseers, supra.*

(*b*) *R.* v. *Morrison* (1852) 1 E. & B. 150.

(*c*) Note, however, *Forrest* v. *Overseers of Greenwich* (1858) 8 E. & B. 890, where the occupiers of a pier which grounded and floated according to the tides were held rateable. The pier was also permanently affixed to the land.

Rival Occupancy

Where premises are used and enjoyed in their various parts by different persons, it is necessary to decide whether each such person shall be separately rated and each such part treated as a separate hereditament, or whether one person whose occupation is paramount shall be rated for the whole of the premises.

It is clear that premises may be rated in parts although there is no structural severance of those parts : separate occupation is not dependent on structural severance (*d*). Neither is it dependent upon questions of legal title, although such questions are by no means irrelevant. Primarily the existence or non-existence of separate occupation is a question of fact. In general a person who has exclusive use of a part of premises and is free in his use of it from the control of others in the premises, has a separate occupation and is separately rateable. Where, however, there is one person using the premises who is entitled to control, and who does in fact control, the use made by others of their several parts, then his occupation is paramount and he alone is rateable.

The problem of separate occupation nearly always arises where one who is originally in occupation of the whole of the premises, whether as owner or lessee, grants the right to use and occupy parts of the premises to others. The general principle applicable in such cases is " that if the owner of the hereditament (being also in occupation by himself or his servants) retains to himself general control over the occupied parts, the owner will be treated as being in rateable occupation : if he retains to himself no control, the occupiers of the various parts will be treated as in rateable occupation of those parts. . . . The question in every such case must be one of fact—namely, whose position in relation to occupation is paramount, and whose position in relation to occupation is subordinate "(*e*).

What is the nature of the control which will prevent there being separate occupation ? It must be control which is exercised in fact ; the mere reservation by the major occupier of a right to control is insufficient if it is not exercised. The right to determine the minor occupancy at will or at short notice is not " control " for this purpose. The control must be of the use of the part of the premises appropriated to the minor occupier, and it must be of such a degree as to prevent an exclusive use and occupation by the minor occupier. The mere fact, however, that the minor occupier is bound to observe the by-laws or regulations of the major

(*d*) *Allchurch* v. *Hendon Union* [1891] 2 Q.B. 436, 441, *per* Lord Esher M.R.
(*e*) *Westminster Council* v. *Southern Ry.* [1936] A.C. 511.

occupier does not exclude separate occupation so long as their observance does not substantially interfere with the minor occupier's exclusive use (*f*). Nor is control of the means of access to the parts of the premises tantamount to control of their use. These principles may be illustrated by comparison of the following cases, which are cited as examples only.

Docks

In *Allan* v. *Liverpool Overseers* (1874) L.R. 9 Q.B. 180, the Mersey Dock Board had appropriated certain berths with quay space and sheds in their docks to the use of shipowners. The shipowners paid a fixed charge, were bound by the Board's by-laws and were liable to penal dues if they left goods overlong on the quays. When the berths and quays were not required by the shipowners, the Board was entitled to use them for others' ships. Upon these facts the shipowners were held not rateable, their occupation being subject to the overriding control of the Board (*g*). This decision may be contrasted with *Young & Co.* v. *Liverpool Assessment Committee* [1911] 2 K.B. 195, where the Board demised certain bonded warehouses to merchants, reserving the right to enter to inspect and repair machinery which was in the warehouses but not connected with their use as such. The keys to the warehouses were held by the merchants although the Board controlled access to the general dock area. The merchants were held rateable, the Board having no control over their use of the premises.

Railway Bookstalls

In *Smith* v. *Lambeth Assessment Committee* (1882) 10 Q.B.D. 327, the Court of Appeal held that W. H. Smith & Son were not rateable in respect of their bookstalls at Waterloo Station. The bookstalls were occupied under an agreement which referred to Smith's as "tenants": their exclusive right to erect bookstalls at the station was subject to the approval of the railway engineer: Smith's employees were bound to obey all reasonable orders of the stationmaster and comply with the company's by-laws and regulations. The ground of the decision was that although Smith's had exclusive enjoyment of their bookstalls, they did not have exclusive occupation, the agreement not being intended to operate as a demise.

(*f*) *Westminster Council* v. *Southern Ry.* [1936] A.C. 511, at p. 532, *per* Lord Russell.

(*g*) This decision was approved on the facts by the House of Lords in *Westminster Council* v. *Southern Ry.* [1936] A.C. 511 at p. 531, but questioned some of the principles there enunciated.

This decision and the test it prescribed were overruled by the House of Lords in the leading case of *Westminster Council* v. *Southern Ry.* [1936] A.C. 511, which was also concerned (*inter alia*) with Smith's station bookstalls occupied under substantially similar agreements. Of the earlier case Lord Russell said (*h*): "... the true question was not considered, namely, the nature of the *de facto* occupation by W. H. Smith & Son of the particular sites in respect of which they had been rated. The only question considered appears to have been whether W. H. Smith & Son had had sites demised to them or whether they had a title to occupy the particular sites: but rateability does not depend on the title to occupy, but on the fact of occupation."

The case also concerned buildings and storage bays at the goods yard of Beckenham Junction. The persons using these buildings and bays were under the terms of their agreements with the railway company licensees. The goods yard was closed by the company at certain hours. Nevertheless the bays and buildings were held capable of separate assessment. The company's right to deny access at certain times, whilst a restriction on the licensees' user, did not alter its character, which was exclusive for their business purposes.

It will be seen from the above that it is the substance of the minor occupier's rights which counts rather than their form. The fact that he is a licensee and not a tenant does not prevent his being a separate occupier, so long as it is possible to define the area of his occupation and the other tests are satisfied. "The crucial question must always be what in fact is the occupation in respect of which someone is alleged to be rateable, and it is immaterial whether the title to occupy is attributable to a lease, a licence or an easement" (*i*). Even where no question of rival occupancy is involved a licensee may be rateable if the exercise of his rights involve a physical prehension of the soil and they are exclusive rights.

Flats and Dwelling-houses

Questions of rival occupancy have frequently arisen in relation to flats and dwelling-houses. In general the same test of control applies. Thus where the owner of a block of flats remains in occupation of stairways and passages, but lets off the flats having separate entrances, there can be little doubt that he intends to

(*h*) At p. 537.

(*i*) *Westminster Council* v. *Southern Ry.* [1936] A.C. 511, at p. 533 *per* Lord Russell. See also *Holywell Union* v. *Halkyer District Mines Drainage Co.* [1895] A.C. 117.

part with the control of the flats and that in consequence each tenant is separately rateable (*k*). Even where the flats are more in the nature of apartments and, as was the case in *R.* v. *St. George's Union* (1871) L.R. 7 Q.B. 90 (*Westminster Chambers* case), the owner's servants have access to the apartments to clean them, the owner does not retain paramount control over the apartments so as to be rateable for the whole premises. However, the test of paramount occupation suggested by Cockburn C.J. in the *Westminster Chambers* case, namely, whether the owner retains control of the outer door, is no longer a valid test, except possibly where the premises are a single dwelling-house. The question of exclusive enjoyment and control is to be considered in relation to the part of the premises used by the minor occupier, and not in relation to the premises as a whole (*l*).

The same considerations apply to a dwelling-house which has been structurally converted so as to form a number of separate flats. In such a case it makes no difference to the rateability of the tenants that the landlord may himself occupy one of the flats.

Where there is no physical separation of the parts of a dwelling-house, the parts can be treated as separate hereditaments if the owner occupies none of the parts himself. In such a case it is apparent that he has not retained control of the dwelling-house, but has abandoned it to his tenants.

If, however, the owner or lessee of a dwelling-house grants the use of part of it to another and continues to reside in the remainder himself, he will in all probability remain rateable for the whole. It has long been established that a lodger, who is a mere licensee, although he may be given the exclusive use of certain rooms in the house is not separately rateable (*m*). Where a person using rooms in a dwelling-house is found to be a lodger, the courts will not look behind this to the substance of the transaction as in the case of licensees on other premises, nor inquire whether the lodger has in fact the exclusive enjoyment of the rooms assigned to him free from the landlord's control. The court will, however, not be similarly bound by an agreement which refers to the minor occupier as a tenant, but will look to the substance of the agreement. If the minor occupier is found to have no greater privileges than those of a lodger he will not be separately rateable. Thus in *Smith* v. *St. Michael, Cambridge* (1860) 3 E. & E. 383, the lessee of a dwelling-house sublet five rooms to the Board of Inland Revenue and provided a servant who resided in the house to clean

(*k*) *Westminster Council* v. *Southern Ry.* [1936] A.C. 511, 525.
(*l*) *Ibid.*, pp. 529 and 532.
(*m*) *Bradley* v. *Baylis* (1881) 8 Q.B.D. 195.

the rooms, light fires and give general attendance. Although the agreement was in the form of a tenancy, the court held that the lessee had not in fact parted with possession of his rooms and that the Board of Inland Revenue had only the status of a lodger. Although the Board had exclusive enjoyment of the five rooms, such enjoyment was not free from the lessee's control (*n*). The fact that the rooms were used for business and not residential purposes is immaterial.

To this extent, therefore, the position of a lodger is exceptional and differs from that of other licensees. This exception is necessary in view of the frequently fleeting nature of the occupancy of a lodger and can be justified upon the basis that the landlord occupies the whole of the premises for the purpose of his business of letting lodgings and that he retains the right of ingress and egress to and from the house (*o*).

The general rule may be stated as follows: " . . . in dealing with the occupation of part of a dwelling-house, if the landlord is living in the house, that fact creates a presumption that the occupation of the other part is that of a lodger rather than that of an inhabitant occupier. But while that is the inference which may be drawn, it is not a necessary inference of law": *per* Sir Richard Henn Collins M.R. in *Kent* v. *Fittall* [1906] 1 K.B. 60, at p. 70 (*p*). It is not impossible to establish that the minor occupier is to be separately rated, but it is not clear what evidence will be sufficient to rebut the presumption against it. In *Helman* v. *Horsham and Worthing Assessment Committee* [1949] 2 K.B. 335, the Rating Appeals Committee of Quarter Sessions found that Helman, the owner of a house, made an oral agreement with Miles that the latter should have sole use and occupation of three rooms on the first floor of the house and a right to use the bathroom and lavatories in common with Helman. Helman remained in occupation of the remainder of the house, both parties using the front and back doors. Upon the facts the Court of Appeal held that Miles had no separate rateable occupation on the grounds that there was not sufficiently clear evidence to rebut the presumption of the landlord's paramount control. Evershed L.J. expressed the view that although in general legal title is not the test of rateability, in the special case of one who occupies rooms in the house of another it is. If there is found to be a demise of the rooms to the minor occupier so that he is not a lodger but a

(*n*) This view of the case was approved by Lord Wright in *Westminster Council* v. *Southern Ry.* [1936] A.C. 511, 556.

(*o*) *Ibid.*, p. 530 *per* Lord Russell.

(*p*) This was a franchise case under the Representation of the People Act, 1867.

tenant both in name and in substance, then this is sufficient to rebut the presumption and establish a separate rateable occupation (*q*). Denning L.J., however, was of opinion that although Miles had a tenancy protected by the Rent Restriction Acts, he was not separately rateable and that nothing short of some physical severance of the two parts of the house would be sufficient to prevent the landlord being rateable for the whole house (*r*).

Discretion as to Dwelling-houses Occupied in Parts

Where, outside London, a single dwelling-house or part of a building which has been adapted as a single dwelling-house is occupied in parts, the valuation officer may instead of treating such part as a separate hereditament, treat the whole or any portion thereof as one hereditament in the occupation of the person who receives the rent of the parts. In exercising his discretion the valuation officer is to have regard to all the circumstances and in particular to the extent to which the parts have been severed by structural alterations : section 57, Local Government Act, 1948 (*s*). If the owner or tenant of the whole dwelling-house has retained paramount control, the section can have no application since *ex hypothesi* the house is not occupied in parts for rating purposes. It also appears that even if the parts of the house are separately occupied, the section can have no application if one of those parts is occupied by the landlord of the whole house, for in such an event there is no person who " receives the rents of the parts " : the landlord, although he receives the rent of the parts which he lets, receives no rent for the part which he himself occupies (*t*).

(*q*) pp. 345 *et seq.*

(*r*) pp. 352. 353. It is submitted that the view of Evershed L.J. is to be preferred. If an occupier is a tenant and is thus entitled to maintain an action of trespass against the landlord, it is difficult to see how the landlord can be said to have retained control of the whole house.

(*s*) Replacing s. 23 (1) of the Rating and Valuation Act, 1925.

(*t*) There would, however, appear to be nothing to prevent all the other parts in the occupation of the tenants from being treated as a single hereditament in the deemed occupation of the landlord.

REGISTERED LAND CONVEYANCING

Practice Notes

The following Practice Notes, which arise out of meetings of the Joint Advisory Committee of the Law Society and H. M. Land Registry, are printed by kind permission of the Editor of the *Law Society's Gazette*.

1. Restrictive Covenants and Positive Covenants (including Indemnity Covenants)—Inclusion in Full in Land or Charge Certificates

A frequent source of complaint by solicitors is that the Land or Charge Certificate does not always set out restrictive covenants and positive covenants (including those for indemnity) in full, but often merely refers to the instrument creating them. While staff difficulties at the Land Registry after the end of the last war prevented the setting out of restrictive covenants in full even where they were not of great length, the position has now improved, and, wherever possible, either the covenants are set out in full in the Certificate, or else the original document creating them or a copy or relevant extract from it is bound up with the Certificate. The Chief Land Registrar may not be prepared to set the covenants out fully where they are of considerable length. Copies of such covenants furnished by solicitors on stout paper, foolscap size, with a sufficient stitching margin in order that they may be conveniently bound (see Rule 308) will, however, always be bound up in the Certificate on request. This has not always been possible hitherto where the original documents or the copies were not of a convenient size for binding in the Certificate, but experiments are being made with encouraging results in the photography of documents for the purpose of reducing them to an appropriate size.

The same procedure is applicable to positive covenants, including those for indemnity both in respect of restrictive and positive covenants. In his report to the Lord Chancellor in April, 1952, the Chief Land Registrar said that the practice had been revived of including in Land Certificates copies of positive covenants contained in instruments of transfer. Although these covenants do not affect the land in many cases, it is necessary for the vendor to obtain an indemnity from his purchaser against liability under them, and it is a great convenience for solicitors to be able to see

at a glance that such covenants have been created. Staff difficulties had previously compelled the abandonment of this practice in 1942.

The inclusion in the Certificate of a copy of the introductory words bringing a covenant into effect is a most important point, and the practice of the Land Registry has always been to do so, where the necessary wording is furnished. Solicitors should therefore ensure that the Land Registry are put in possession of the requisite information at the time of the application for registration. If this is furnished subsequently a further fee may be charged if the Register has to be altered.

2. Protection of Options and Other Estate Contracts Affecting Registered Land

Options and other estate contracts affecting registered land may be protected on the Register in one or other of three ways.

The first and most usual way is by registering notice under section 49 (1) (*c*) of the Land Registration Act, 1925. The application should be made by letter and must be accompanied by the documents creating the option, etc., and a certified copy for filing and a fee of 10s. The land certificate must be lodged in the Registry and, if the property is in mortgage and the mortgagee is to be bound by the notice, the Charge Certificate must be lodged. Section 52 of the Act provides that a disposition by the registered proprietor takes effect subject to all estates, rights and claims which are protected by way of notice on the register at the date of the registration or entry of notice of the disposition, so far as they are valid and not overridden by the disposition (*e.g.*, by a sale by a mortgagee in exercise of his powers who was not bound by the option).

The second and much rarer method is by registration of a restriction. In this case, the signature of the registered proprietor against whom the restriction is to be registered must be obtained on Form 75, which is the application form for registration of a restriction under section 58 of the Land Registration Act, 1925. This form should normally be signed by the proprietor when he grants the option, and the Land Certificate must be lodged in the Registry for the purpose of the transaction. The signature of the proprietor has to be obtained because the restriction limits his powers and therefore he must normally be a party to such limitation. Section 58 (5) of the Act, however, provides that rules may be made to enable applications to be made for the entry of restrictions by persons other than the proprietor, and Rule 236 has

been made in this connection. The fee for registration of a restriction is 10s.

The registration of notices or restrictions are friendly proceedings which may be adopted with the co-operation of the registered proprietor. Where, however, the registered proprietor refuses to lodge his Land Certificate, it is necessary to resort to the third method of protection. This is the hostile procedure by way of caution under section 54 of the Act. The fee for registering a caution is again 10s. For further details reference may be made to the article in Vol. 17, p. 105, entitled " Rights of Third Parties in Registered Property."

3. " T " Marks on Filed Plan

The practice of the Registry is to show " T " marks on the Register or on the filed plan only where they are specifically referred to in a deed or other document lodged for registration in such a way that an appropriate entry can be framed. " T " marks will not be shown on the filed plan unless a specific reference to them appears on the Register. If it were otherwise, difficulties might be raised by subsequent purchasers.

If the document states that the boundary or a party wall marked " T " is included in the registration, that will appear on the Register and an indication given as to which boundary is marked " T." If a schedule of restrictive covenants includes positive covenants relating to the maintenance of boundaries, those boundaries will be identified on the Register. Positive covenants as to the maintenance of fences contained in a transfer will be set out in the Register wherever possible or otherwise referred to therein (see Note 1 above) and the boundaries indicated, because otherwise, the transfer being filed in the Registry, the existence of the covenants might be overlooked.

4. Requisitions from Land Registry

It is sometimes thought that all requisitions received from the Land Registry are required to be returned with the solicitor's replies, so that he has to make a duplicate copy for retention. The true position is that, where the Registry requires a communication to be returned to it with the answer endorsed thereon, it is issued in duplicate so that the solicitor may keep one copy. Otherwise it need not be returned. A note making the position clear has now been added to those requisitions which the Registry does not require to be returned.

5. Filed Plan—Colouring

It is the practice in the Registry to make enlargements of plans wherever the colourings are not plainly visible in plans drawn to the normal scale of 1/1250. In any case where the plan issued is thought to be on too small a scale, it will always be considered on request with a view to providing a plan on a larger scale.

6. Attachment of Plan on Conveyance or Transfer to Land Certificate

Relative to Note 5 is the question whether the parties' own plans attached to the conveyance or transfer should be bound into the Land Certificate as a matter of course. The Registry is not prepared to do this in all cases, having regard to the fact that a number of plans received are merely rough freehand drawings or otherwise inadequate. In such cases, however, as those of overlapping floors or party walls where solicitors and their clients have taken the trouble to have detailed plans prepared on large scales, which approximate almost to architectural drawings, the Chief Land Registrar is ready to consider using such plans either as an adjunct to or in substitution for the filed plan.

7. Mergers of Leases—Land Registry Fees

The Land Registration Fee Order, 1930, Paragraph IX, provides that on application (*inter alia*) to cancel a notice of lease on merger, where any title has to be examined by the Registrar, the Land Registration fee is to be the same as for the first registration under Scale No. 1 of that Order of the interest which has determined. Where the Registrar does not have to examine any title the fee charged varies according to the circumstances, but is never more than 10s., which is the amount chargeable under paragraph VIII of the Fee Order for the removal of notice of a registered lease. Normally a fee is not charged for removing notice of a lease which has expired by effluxion of time, or when a fee has been paid on registration of a transfer where the consideration includes the value of both the freehold and leasehold interests.

8. Mergers of Rent-charges—Appropriate Form

There is no special form appropriate for use in effecting merger of a rent-charge where the owner of the land buys the rent-charge, and applications of this nature may be made by letter. If the title to the rent-charge is not registered, conveyancing evidence of the title to it should accompany the application, together with a fee

under Scale No. 1 of the Land Registration Fee Order, 1930, calculated according to the purchase price paid for the rent-charge.

Very few applications of this kind are received by the Registry. Should there ever be an appreciable number, a form of application would be provided. In the meantime, Form 92, which is used for applications to cancel notice of unregistered leases, may be adapted and used as an application form for merger of an unregistered rent-charge.

9. Valuations by Solicitors

The Chief Land Registrar has agreed to the revision of such application forms as Form 1c (Application by Solicitors for Registration of Freehold Land, not on a recent purchase) and 2c (Application by Solicitors for Registration of Leasehold Land, not on a recent purchase) by the deletion of paragraph 6 (or corresponding paragraph), which states the present value of the land, from the statutory declaration. The substance of the deleted paragraph has been inserted in the earlier part of the application cover, so that the statement as to value will not be made by solicitors on oath.

10. Protection of Lessee where Lease not an Overriding Interest —Registration of Leases and Assignments of Leases

(a) *Where the freehold or superior leasehold is registered (whether in the compulsory areas or not)*

A grant of a term of more than twenty-one years by the registered proprietor must be completed by registration if the grantee is to obtain a legal estate (sections 20 and 23 of the Land Registration Act, 1925).

Notice of the grant should be entered against the freehold or superior leasehold title (section 48) and the Land Certificate of the title of the freeholder or superior leaseholder should be produced. Notice may be entered without the concurrence of the registered proprietor and production of his Land Certificate where the lease is binding on him (proviso to section 48 (2)).

(b) *Where the freehold or superior leasehold is not registered (compulsory areas only)*

(i) A grant of a term of forty years or more or an assignment on sale of leasehold land where the lease has not less than forty years to run at the date of the delivery of the assignment *must* be completed by registration within two months from the date of the grant or the assignment if the lessee or assignee is to obtain the legal estate (section 123).

(ii) A grant of a term of more than twenty-one years but less than forty years, or an assignment of a term having less than forty years, but more than twenty-one years unexpired, *may* be registered.

(c) *Position where lessee fails to register*

(i) As stated above, the lessee may not obtain the legal estate in the lease.

(ii) A lessee who has not protected himself in accordance with the foregoing provisions, may nevertheless have an overriding interest under section 70 (1) (*g*) if in actual occupation of the land or in receipt of the rents and profits thereof.

(iii) If a lessee or assignee has failed to register in accordance with paragraph (b) (i) above, and application is made for the registration of the freehold or superior leasehold, the existence of the lease ought to be disclosed in the application, and if it is, notice of it will be entered on the Register automatically. If the grantee or assignee subsequently applies for registration, he will have no difficulty in obtaining an order under section 123, provided more than twenty-one years of his lease are unexpired (section 8 (1) (*a*)).

(iv) If a head lessee fails to register, he cannot confer a legal estate on a sub-lessee (*British Maritime Trust* v. *Upsons, Ltd.* [1931] W.N. 7).

(d) *The following interests are incapable of registration* :—

(i) A lease with only twenty-one years (or less) to run at the time of application (section 8 (1) (*a*) and section 19 (2), proviso (*a*)).

(ii) A mortgage term where there is a subsisting right of redemption (section 8 (1) and section 19 (2), proviso (*b*)).

(iii) A lease containing an absolute prohibition against alienation *inter vivos* (section 8 (2)).

(iv) An agreement for a lease (section 8 (1) (*b*)).

The interests referred to in items (iii) and (iv) may be protected on the Register by notice, but such protection is not required in the case of a lease mentioned in (i) if the lease is granted at a rent without taking a fine (section 19 (2), proviso (*a*)).

11. Sales off in Plots—Certificate Deposited at Registry

Where registered land is being sold off in plots, it may be necessary for the Land or Charge Certificate to be deposited at the Registry for a long period. With a view to the prevention of error it is recommended that the vendor should apply at the

outset for an office copy of the filed plan so that he can mark off the plots as each sale takes place. If this procedure is adopted, it should not normally be necessary for solicitors to ask for the Land or Charge Certificate to be returned to them, but if they so desire before the transfers of all the plots have been completed in the Registry, the Chief Land Registrar is prepared to have the Certificate made up to date and to issue it accordingly, although he might not be able to do this at regular intervals, particularly in the case of building estates. Any mistake on the Register due either to the wrong plot having been transferred by the registered proprietor or released by the chargee or wrongly removed by the Registry would very quickly be discovered by the operation of the official search system and by the registration of the transfer of the property wrongly removed from the title.

12. Filed Plan—Field Numbers and Areas

Field numbers and areas are not shown on the filed plan. The reasons why the Chief Land Registrar will not agree to this being done are as follows :—

(a) A survey over the whole of the country is being carried out by the Ordnance Survey on the National Grid. This will introduce completely new co-ordinates, which will render obsolete the field numbers shown on existing ordnance survey maps.

(b) The six-inch ordnance maps do not show acreages, and these are used in case of mountain or other undeveloped land.

(c) The acreages shown on one edition of the ordnance survey maps differ from those shown on another edition. Acreages stated in deeds are sometimes inaccurate, but any acreages shown on the filed plan would naturally be assumed to be correct.

(d) For field numbers and areas to be shown, the Registry would have to consider not only the actual acreage shown on a parcel in the ordnance survey, but also the extent of a part of that parcel, where it has been sub-divided. In such a case there might not even be any physical boundaries.

13. Boundaries—" Hedge and Ditch " Rule

The boundaries shown on the filed plan or general map are only general boundaries and follow the ordnance survey map through the centres of hedges. In the case of agricultural land, this is frequently incorrect, having regard to the " hedge and ditch " rule. The explanation of the Registry's practice is to be found in rule 278 in cases where the boundaries have not been fixed.

14. First Registration—Certified Copy Conveyance or Transfer

Where the assurance immediately preceding a first registration is effected by a conveyance, a certified copy is required to be lodged in the Registry with the documents on first registration. Where a Land Registry form of transfer is used under rule 72 in lieu of a conveyance, it is in future recommended for consistency and general convenience that the transfer should be lodged with a certified copy, as is done where a conveyance is used. The original transfer will be issued on completion of the registration and the certified copy retained in the Registry.

15. Stamping of Original Documents by Registry

The Registry's practice on first registration is to place its official stamp with the title number, etc., in the case of a freehold title on the conveyance to the applicant and in the case of a leasehold title on the lease and on the assignment to the applicant. Unfortunately staff difficulties appear to prevent the Registry reverting to its original practice of stamping every document before returning them to the solicitors. It is pointed out that the real protection of a purchaser against any possible fraud or mistake lies in the existence of the Index Maps, which he can search free of charge prior to completion.

16. Search to Ascertain Whether Title Registered

Rule 286 (2) states that an application for an official search of the Index Map and Parcels Index shall describe land to which it relates by means of a copy of or extract from the ordnance map on the largest scale published. The Chief Land Registrar has, however, stated that, on and after the date on which registration of title becomes compulsory in any area, official searches of the Index Map, to ascertain whether certain land is registered or whether there are any cautions or priority notices against first registration, will be made without fee and without a plan, provided that such a description of the land is given as will enable the land to be identified on the Index Map. In compulsory areas, local authorities are under an obligation to notify changes of street numbers to the Registry, and consequently the Registry has up-to-date lists of all street numbers in those areas and most searches therein can therefore be made without plans. These facilities do not exist in the non-compulsory areas, and as a result plans are much more frequently required to identify the property; but it is understood, however, that the Registry is always ready to act on a description which is sufficient to establish the identity of the property.

NOTES OF RECENT CASES

1. *LAW OF PROPERTY AND CONVEYANCING*

By S. M. Tolson, Barrister-at-Law

Mason and Another v. *Clarke* [1954] 2 W.L.R. 48; [1954] 1 All E.R. 189

Profit à prendre—game—extermination of rabbits—reasonable operation—Ground Game Act, 1880, *s.* 1 (1) (*b*)—*Agriculture Act,* 1947, *s.* 98—*equitable right—illegality—unenforceable.*—This case concerned the rights and obligations of a landowner as regards rabbits on his land when the game rights are vested in another person.

The facts were that the second plaintiff, B, had let in 1926 certain farm land to the defendant reserving to himself all game, rabbits and fish on the land, and the defendant had agreed (subject to the Ground Game Act, 1880) not to shoot or sport on the land. The rabbits had become such a serious nuisance on the land, that after pressure put upon him by the Agricultural Executive Committee, the defendant agreed with the Committee that they should gas the rabbits, and this was duly done. Meanwhile, B had orally leased the rabbiting rights over the land to the first plaintiff, A, and this agreement was evidenced by a receipt which stated that the consideration paid by A for the rights was a contribution "towards bailiff's wages." A had erected snares on the land which the defendant had kicked over to save his sheep from injury. A and B claimed that there had been a breach of covenant and a trespass against their profit.

As against B, the Court of Appeal found for the defendant. Denning L.J. pointed out that the "reservation" of the game in the lease was not properly a reservation but a regrant by the defendant of a *profit à prendre.* This being so, the defendant's duties were firstly not to derogate from his grant, and secondly not to shoot or sport on the land except in accordance with the Ground Game Act, 1880. In *Peech* v. *Best* [1931] 1 K.B. 1, Greer L.J. said at p. 18 that "a grant of land without sporting rights did not preclude a landowner from carrying out any reasonable and normal operations which might be deemed advisable for the purpose of dealing with the land to the best advantage as farming land." Denning L.J. thought that, quite apart from the Ground Game Act, 1880, gassing the rabbits clearly came within the ambit of this dictum, as the defendant was only doing what was advisable and necessary in the interests of good farming. Romer L.J. thought that in any event, as the gassing was neither "shooting" nor "sporting," the defendant had probably not acted in breach of covenant. The court agreed that the gassing of the rabbits was certainly authorised by the Ground Game Act, s. 1 (1) (*b*).

The court also found for the defendant against A. A having no deed had no right at law to a profit, and the question was, did his oral agreement give him a right in equity? The court found that the receipt had probably been made out to defraud the Inland Revenue (certainly it was knowingly false and made with some dishonest motive), and this tainted the whole agreement, for he who comes to equity must come with clean hands. As a result, A had neither a right in equity to specific performance, nor any lawful authorisation from B to be on the land, and in fact he was no better than a trespasser. However, quite apart from the validity of A's right to be on the land, he had no ground of complaint against the defendant except that the defendant had kicked over his snares. The court held that it was unreasonable for A to lay snares on the defendant's sheep pasture without an agreement with him, for both landowner and sporting tenant must use their land reasonably having regard to the interest of the other. [See *Peech* v. *Best* (*supra*, at p. 14).]

Nichols v. *Walters* [1954] 1 W.L.R. 1; [1953] 2 All E.R. 1516

Mortgage—interest in arrear—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, *s.* 7 (*a*).—Section 7 of the Rent Act of 1920 provides that, in a mortgage to which the Act applies, the mortgagee shall not be entitled to take any steps for enforcing his security unless (*inter alia*) the interest is more than twenty-one days in arrear. The Court of Appeal held in this case, applying the long-standing decision in *Evans* v. *Horner* [1925] Ch. 177, that if the interest being more than twenty-one days in arrear is subsequently paid, the protection of section 7 is nevertheless not revived.

For this reason the court did not have to proceed to consider the interesting question of whether the property was in fact subject to the Rent Acts or not. The plaintiff had been a tenant of the mortgaged premises, which were then subject to the Rent Acts, and partly by means of the mortgage money she had purchased the freehold. She had not since let the premises or any part of them. Section 12 (6) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides that "where this Act has become applicable to any dwelling-house or any mortgage thereon, it shall continue to apply thereto whether or not the dwelling-house continues to be one to which this Act applies," but the meaning of this subsection is still quite obscure. (See Megarry on the *Rent Acts*, 7th ed., at p. 17.) The only direct reference to the point appears to be that of Kennedy C.J. in *Wallace* v. *Fogarty* [1926] I.R. 255, at p. 259, where he said that the Rent Acts applied to property which was otherwise controlled if the premises had been let at some time during the operation of the Acts.

Re Tout and Finch [1954] 1 All E.R. 126; [1954] 1 W.L.R. 178

Building contract—equitable assignment of money earned—trust. —By a contract between a building contractor and his employer it was provided that the periodical payments made by the contractor to the specialist subcontractors for work already done were to be made " less any retention money which the contractor may be entitled to deduct." The periodical payments by the employer to the contractor as the building progressed were to be made on the same terms, and the retention money was to be paid to the contractor when the building was finished. By a subcontract between the contractor and a subcontractor it was provided that the contractor's interest in any " retention money " was fiduciary as " trustee for the subcontractor." " Retention money " was defined in the subcontract as the proportion attributable to the subcontract works of the amount retained by the employer in accordance with the main contract.

The building was practically completed when the contractor went into liquidation, but the employer did not take over completion of the contract. The subcontractor contended that the contractor was trustee for him of the retention money due under the subcontract, and that the contractor or the liquidator was bound to hand over the money to him when it became payable by the employer.

Wynn Parry J. held that by the subcontract there had been an equitable assignment of the contractor's interest in the retention money to the subcontractor, and that the contractor was a trustee of the money. The money was not (as in *Wilmot* v. *Alton* [1897] 1 Q.B. 17) profits earned after liquidation which cannot be assigned, but was money already earned though not yet payable over which the liquidator had no priority. The Court of Appeal held in *Drew & Co.* v. *Joseleyne* (1887) 18 Q.B.D. 590 that even where the trustee in bankruptcy himself completes a building contract, it cannot give him any priority over the equitable assignees of the retention money.

Brown v. *Minister of Housing and Local Government* [1953] 1 W.L.R. 1370; [1953] 2 All E.R. 1385

Compulsory purchase—notice—whether statutory tenant an " occupier "—Acquisition of Land (Authorisation Procedure) Act, 1946, Sched. I, art. 3 (i) (b).—The question here was whether a statutory tenant under the Rent Acts is an " occupier " within Sched. I, art. 3 (i) (b), of the above Act so as to be entitled to notice of a compulsory purchase order made in respect of the property of which he has protected possession. Barry J. held that a statutory tenant is an " occupier " within the meaning of the schedule, and that it would be a quite artificial limitation on the meaning of the word to hold otherwise. His Lordship thought also that had the legislature meant to exclude statutory tenants from the provisions of article 3 (i) (b) they would have done so expressly. Although the word " tenancy " in connection with protected possession under the Rent

Acts has been much criticised, it has never been suggested that a statutory tenant is not an occupier.

Brewer Street Investments, Ltd. v. *Barclay's Woollen Co., Ltd.*
[1953] 3 W.L.R. 869; [1953] 2 All E.R. 1330

Building—extra work outside licence.—The defendants were prospective tenants of the plaintiffs and had agreed to pay for certain alterations to be done to the premises by the plaintiffs' contractor. They also separately ordered a certain door to be added, but for this no licence had been obtained. When the negotiations between the parties broke down, the plaintiffs demanded from the defendants the cost of all the alterations, but the defendants refused to pay for the door on the ground that the work was illegal.

The Court of Appeal found for the plaintiffs. The defendants, of course, relied on the principle in *Dennis & Co., Ltd.* v. *Mann* [1949] 2 K.B. 327, that if the amount of the licensed specification is exceeded the free allowance is not available to cover it, but Somervell L.J. said that an extra separately ordered was prima facie outside that principle. (See *Muir* v. *Jones* [1953] 1 Q.B. 454; and Vol. 17 at p. 150.) The onus was on the defendants to prove that in fact the door though separately ordered was so involved in the specification as to form part of it. This they had failed to do, and as the cost of the door did not exceed the amount of the free allowance, the defendants were bound to pay for it.

R. v. *Judge Willes, ex p. Abbey National Building Society*
[1954] 1 W.L.R. 136

Legal charge—action for recovery of land—County Court Rules, 1936, Ord. 24, r. 4 (2).—This was an application for an order of mandamus against a county court judge who had held he had no jurisdiction to enforce a legal charge exceeding £500 secured on land worth less than £100 a year. Lord Goddard C.J. referred to Ord. 24, r. 4 (2) of the County Court Rules which expressly gives this jurisdiction, and the court granted the application.

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2. *TRUSTS*

Re Greaves [1953] 3 W.L.R. 987; [1953] 2 All E.R. 1395

Power of appointment—revocation—application of doctrine of fraud.—Vaisey J. refused to reopen the difficult question as to whether a power of revocation as opposed to the release of a power can be fraudulently exercised, and he followed Astbury J.'s decision in *Re Jones' Settlement* [1915] 1 Ch. 373, where it was held that

the doctrine of fraud did apply to the revocation of a deed of appointment even though it does not to a deed of release (*Re Somes* [1896] 1 Ch. 250). (See Farwell on *Powers*, 3rd ed., at pp. 466 and 497.) Though this conclusion is somewhat of an anomaly, the doctrine of fraud is, as his Lordship pointed out, rather technical in its application.

The facts before Vaisey J. were, that the appointor who had a life interest in the trust fund, had executed a revocable deed of appointment, and then in 1952, in accordance with a prearranged scheme for the partial distribution of the capital of the trust fund, she revoked the deed and released her power of appointment. It was proposed that she should then purchase the reversionary interests from her children, who were the objects of the power and also entitled on default of appointment. If the scheme was valid the effect of these transactions would be to vest absolutely in the appointor and her children such proportions of the freed capital as represented the value of their respective interests under the trust. The real purpose of the scheme was, of course, to save the payment of a considerable sum in estate duty on the death of the appointor.

The learned judge having decided that the doctrine of fraud might apply to the deed of revocation, proceeded to consider whether in fact the deed was fraudulent. He was obviously much impressed by the fact that the scheme operated to put a large sum of money into the hands of the appointor. He referred particularly to observations in *Portland* v. *Topham* (1864) 11 H.L.C. 32, 54, 55, to the effect that the appointor must have no ulterior object to accomplish and must not himself acquire any benefit directly or indirectly, and on these grounds he held that the deed of revocation had been fraudulently exercised and was void. His Lordship distinguished *Re Huish's Charity* (1870) L.R. 10 Eq. 5 and *Re Merton* [1953] 1 W.L.R. 1096; see Vol. 17, p. 416, on the ground that in those cases the appointment and sale were entirely separate transactions while in the present case all the transactions had been previously agreed upon and were really one.

With respect this distinction seems somewhat artificial and difficult to apply, for who can say when an appointment or revocation is executed what further steps may then be contemplated by the appointor? Provided that the appointor allows an interval of time before purchasing the reversion it would appear that his position is the same as in *Re Merton* (*supra*). Also it would appear that Vaisey J. considered the benefit accruing to the appointor as a result of the scheme without bearing in mind the benefits which would be gained by the children. The headnote in *Re Huish's Charity* (*supra*) says: "An appointment made with the object that the appointor may obtain an exclusive advantage to himself is bad; but if the object of the appointment is to secure a benefit for all the objects of the power, the appointment is not bad, although the appointor may to some extent participate in such benefit." This would seem to apply to the instant case exactly, for the main benefit under the scheme would have passed to the children at the expense of the Inland Revenue.

Re Brown [1953] 3 W.L.R. 877; [1953] 2 All E.R. 1342

Trust for sale—restraint on alienation to other than four beneficiaries—validity.—Harman J. had to decide a point which has for long been unsettled, namely, whether or not a condition attached to a gift of realty restraining alienation to all except a particular class of persons is valid. (See Jarman on *Wills,* 8th ed., vol. 2, p. 1480, and Cheshire's *Modern Real Property,* 6th ed., p. 524.)

The facts were that by virtue of their father's will four sons had become tenants in common of their father's "business properties," and by a separate clause it was provided that certain discretionary trusts should arise over the share of any son who executed "any assurance or mortgage whereby" that share or part of it "might become vested in or payable to any person other than" one of the sons. One of the sons had in fact assigned his share to his brothers. In this case the property was in fact personalty by virtue of the statutory trust for sale imposed by the Property Acts, but this makes no difference as the rights of alienation are the same in both realty and personalty.

As Harman J. observed, the instinctive feeling is that all restraints on alienation are void (see Jarman on *Wills,* at p. 1477), but as a result of the passage in Coke on *Littleton,* vol. 2, s. 361, to the effect that a condition restraining alienation to certain named people is good, a large number of conflicting decisions have been made, and the passage has been used as authority for saying that a condition restraining alienation to all the world except certain named persons is equally good.

The two leading conflicting cases are *Attwater* v. *Attwater* (1853) 18 Beav. 330 and *Re Macleay* (1875) L.R. 20 Eq. 186. In the former case the devisee received a gift of land "with an injunction never to sell it out of the family; but if sold at all it must be to one of" the devisee's "brothers . . ." of whom there were five named. Notwithstanding the earlier decision to the contrary in *Doe* d. *Gill* v. *Pearson* (1805) 6 East 173, Romilly M.R. held that the condition was bad as being in effect an injunction never to sell the property at all.

In *Re Macleay* (*supra*) the gift was "to my . . . brother John . . . on the condition that he never sells it out of the family." Jessel M.R., who criticised Romilly M.R.'s decision in the earlier case, held that the condition was good as the test was whether it took away the whole power of alienation substantially, this being a question of substance and not of mere form. Later on, in *Re Rosher* (1884) 26 Ch.D. 801, Pearson J. said he thought that *Re Macleay* (*supra*) had been wrongly decided.

Harman J. pointed out that in the instant case the class to whom alienation might be made was a steadily diminishing one, as compared with the position in *Re Macleay* (*supra*) where the family might increase with the passage of time. Bearing this in mind, and because he felt free to take his own view, he came to the conclusion, following *Attwater* v. *Attwater* (*supra*), that the provision before him was a general restraint on alienation and could be disregarded.

This conclusion would seem to bear out the distinction made in

Jarman at p. 1479 between cases where the alienation is restricted to an ascertainable class, and those like the present where it is restricted only to named persons. It is to be hoped that this problem will soon come up for general review by the Court of Appeal.

Re Rees, decd. [1954] 2 W.L.R. 59; [1954] 1 All E.R. 7

Trust for sale—protective trust—no express power of advancement—forfeiture—Trustee Act, 1925, *ss.* 32, 33, 69.—This is an important addition to the authorities concerned with the effect of the consent of a protected life tenant to the exercise of a power of advancement.

In *Re Hodgson* [1913] 1 Ch. 34, before the Property Acts, Neville J. held that consent to the exercise of an express power of advancement did not cause the forfeiture of a protected life interest. Under section 33 of the Trustee Act, 1925, the statutory protected life interest is expressly excepted from forfeiture on the exercise of an express power of advancement, or of the statutory power contained in section 32 of the Trustee Act, 1925. In *Re Stimpson's Trusts* [1931] 2 Ch. 77, Luxmoore J. held that consent to the exercise of the statutory power of advancement did cause a forfeiture where the settlement had been made long before 1925, but the reasons for this decision are not reported. Finally in *Re Shaw's Settlement* [1951] Ch. 833 (see note Vol. 15, p. 184), where the settlement had been made long before 1925 and there was an express power of advancement, Harman J. followed *Re Hodgson* (*supra*).

In the instant case the facts covered new ground; express protective trusts had been created after 1925, and there was no express power of advancement. Upjohn J. therefore had to decide whether the statutory power of advancement must be read into the will and if so, whether the consent of a life tenant to its exercise forfeited his or her life interest.

On the first question, his lordship said that the proper view was to assume that the draftsman had in mind the very beneficial power conferred by section 32 of the Trustee Act, 1925. To exclude that power there must be a clear contrary intention expressed. (Section 69 (2), Trustee Act, 1925.) He found that there was no such contrary intention expressed in the instrument before him and therefore section 32 should be read into it. (*Re Garrett* [1934] Ch. 477.)

On the second point, his Lordship decided that there could be no possible difference between a settlement with an express power of advancement, and one which incorporated section 32, and for this reason he followed *Re Hodgson* (*supra*) and *Re Shaw's Settlement* (*supra*) and held that a life tenant's consent would not involve a forfeiture. His Lordship did not consider *Re Stimpson* (*supra*) owing to the inadequacy of the report, but it is, of course, easily distinguishable on the ground that the settlement in that case was made long before 1925, and section 32 could not have been in the mind of the draftsman.

As it is wiser to make protective trusts expressly rather than to rely on the statutory form (see *Key and Elphinstone,* 15th ed., Vol. 2

at p. 602), and as each settlement must be separately interpreted, consent to the exercise of the statutory power of advancement should obviously be expressly excepted from causing a forfeiture in every express protective trust, in order to remove the possibility of an application to the court on this point. (See, *e.g.*, *Key and Elphinstone* (*supra*) at p. 628, f. 18.)

Re Adlard [1953] 3 W.L.R. 914; [1953] 2 All E.R. 1437

Voluntary settlement—covenant to settle after-acquired property—binding if trustees receive property.—It is, of course, a longstanding principle that a covenant in a settlement to settle after-acquired property is not enforceable by the trustees against a volunteer, but in this case the question which arose was whether such after-acquired property could be recovered by a volunteer freed from any obligation under the covenant when it had already passed directly into the hands of the trustees.

Vaisey J. held that it could not be recovered in these circumstances. He applied *Re Bowden* [1936] Ch. 71, where the facts were the most nearly like those before him, where a settlor had voluntarily settled her expectancy under her father's will giving her trustees full authority to receive it. Sixty years after it had come into their hands, she asked that it should be transferred to her as her absolute property. It was held that as soon as the trustees had received it, the property became impressed with the trusts of the settlement which were valid and enforceable.

In the instant case three unmarried daughters had covenanted to settle after-acquired property, and when, more than thirty years later, in 1951, certain funds became subject to the covenant, they authorised that the money should be paid over to the trustees in the belief that their covenants were enforceable, contrary to their personal wishes. There was some doubt as to whether the settlements were in fact voluntary, but Vaisey J. gave judgment on the presumption that they were. He said that it made no difference that the trustees had held the property for a much shorter period than in *Re Bowden* (*supra*), for the property had passed, and the sisters had no claim in law or equity which could deprive the trustees of what was rightly vested in them under the terms of the settlements.

It is difficult to see how his Lordship could have come to any other conclusion, for it would appear to be clear that all that equity will not do in the case of a voluntary incompletely constituted trust, is transmute possession. [See *Re Bowden* (*supra*) at p. 75.] The rule in *Strong* v. *Bird* (1874) L.R. 18 Eq. 315, shows that it does not matter if the property comes into the trustees' hands indirectly, for once it does vest, the trusts are completely constituted and binding.

This case should act as a warning, for, from the tax point of view, it is clearly very important nowadays that voluntary covenantors should be correctly advised and particularly where the covenant was made before the war.

Re George Whichelow, Ltd. [1954] 1 W.L.R. 5; [1953] 2 All E.R. 1558

Trustee shareholder—discretion in method of voting—beneficiaries' directions as to method of voting—no presumption that beneficiaries past childbearing age.—Three blocks of shares comprising a substantial but not controlling voting power in a company had been left by will on trust to three sisters for life with remainder to their children who should attain twenty-one. The three sisters who were all over fifty, and their children who were all over twenty-one, directed the trustees to vote in a certain way at a forthcoming general meeting of the company, but the trustees refused to do so and said they would use their own discretion in voting. The beneficiaries then issued a writ against the trustees, and sought interlocutory relief that the trustees should comply with their directions. The beneficiaries contended that they were all the persons entitled to the shares and could validly direct the trustees as to how they should vote, but Upjohn J. refused to grant any relief on an interlocutory motion.

The beneficiaries relied on *Butt* v. *Kelson* [1952] Ch. 197 (see note *sub nom. Re Butt,* Vol. 16 at p. 57), where Romer L.J. said at p. 207 that the beneficiaries could compel the trustees to vote as they, the beneficiaries, thought proper. It was also argued that the court could presume that the three sisters were past childbearing age as in *Re Thornhill* [1904] W.N. 112, and that therefore all the beneficiaries were absolutely entitled.

Upjohn J. obviously had very great doubts as to the correctness of Romer L.J.'s words in *Butt* v. *Kelson* (*supra*), and he referred to *Tempest* v. *Lord Camoys* (1882) 21 Ch.D. 571, where Jessel M.R. said at p. 578: "It is settled law that when a testator has given a pure discretion to trustees as to the exercise of a power, the court does not enforce the exercise of the power against the wish of the trustees." It would certainly appear that *Butt* v. *Kelson* does conflict with this principle.

His Lordship distinguished *Re Thornhill* (*supra*) on the ground that there was no dispute there as to the rights of the parties, and he refused for that reason to presume that the sisters were past childbearing age. He found that the trustees were acting entirely in good faith and as they had not had a direction as to how they should vote from all persons who were in strict law beneficially entitled, they could exercise their discretion as they wished. (See Underhill on *Trusts,* 10th ed. at p. 427.)

Practice Direction [1953] 1 W.L.R. 1452; [1953] 2 All E.R. 1408

Trustees costs—form of order.—At a sitting of the court Vaisey J. referred to the practice direction with regard to trustees' costs. (See Vol. 17, p. 439; [1953] 1 W.L.R. 1365 and [1953] 2 All E.R. 1159.) He emphasised that it was absolutely wrong to say that under the direction there would be a taxation more hostile to the trustees. On the contrary, he explained that it had recently been realised (presumably as a result of *Re Dargie* [1953] 1 W.L.R. 991; [1953] 2

All E.R. 577; see note, Vol. 17, pp. 309–10, also before Vaisey J.) that on a summons by trustees for a purpose such as the construction of a will, the longstanding practice of directing that the costs should be taxed as between solicitor and client might not give the trustees the whole of what they were entitled to. His Lordship referred to *Re Robertson* [1949] 1 All E.R. 1042 as a plain instance of this happening, and said that it had been decided that a form of words should be used adopted from section 60 of the Trustee Act, 1925, which would give the trustees all the costs to which they were entitled; *i.e.*, " the costs and expenses of and incident to any application." He stressed that it was of great importance that the profession should understand that if, nevertheless, a trustee does submit to having his costs taxed as between solicitor and client, he is entitled to his costs so taxed and nothing more. He cannot help himself to what has been disallowed. (See *Re Dargie, supra.*)

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3. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Re Hillier's Trusts [1954] 1 W.L.R. 9; [1953] 2 All E.R. 1547.

Failure of object—cy-près doctrine—resulting trust.—A number of cases have established a distinction between the effects of failure of object on gifts to charitable institutions or for charitable purposes. If the purpose indicated is exclusive, the gift will be held on a resulting trust if it is impossible for that purpose to be effectuated. Legal impossibility of carrying out such intention is included (*Att.-Gen.* v. *Bishop of Oxford* (1786) 1 Br.C.C. 444n.). On the other hand, a general charitable purpose may underlie the gift for a particular purpose, in which case the lapsed gift may be devoted *cy-près* to some lawful analogous purpose (*Att.-Gen.* v. *Vint* (1850) 3 De G. & S. 704). If the gift is to a named charitable institution and that institution ceases to exist the gift usually lapses (*Re Ovey* (1885) 29 Ch.D. 560). But here again it will be applied *cy-près* if the reference to the institution is merely a means of carrying out a more general purpose (*Re Rymer* [1895] 1 Ch. 19; *Re Lucas* [1948] Ch. 424). A charitable institution already in existence can hardly be illegal in itself but it may well be illegal to set up a projected institution and yet the gift may evince a general charitable intention (*Re Colonial Bishoprics Fund 1841* [1935] Ch. 148).

In the instant case a charity campaign was organised. Donations were received in two forms. Some were collected at entertainments without any documentation. Others were received with forms on which the donors directed that the money should be used either for the erection of certain specific projected hospitals or for use at the discretion of the committee for the improvement of local hospital services generally. Subsequent legislation prohibited the creation of any new voluntary hospitals. It was therefore necessary to decide the fate of the funds already collected.

Upjohn J. held that sums donated specifically for the erection of the hospitals lapsed and must be returned to the donors. There was a particular object in view and this could not now be achieved (following *Re University of London Medical Sciences Institute Fund* [1909] 2 Ch. 1). The striking out of the alternative direction to use the funds at discretion negatived any general charitable intention. On the other hand, sums directed to be used at discretion should be applied *cy-près* among existing local hospitals and did not lapse, as the donors evinced such an intention. The learned judge did not have to decide the fate of the loose collections but it is submitted that these would also be applicable *cy-près*.

In the recent decision as to surpluses of the Lynmouth funds (*Re N. Devon Relief Fund* [1953] 1 W.L.R. 1260) there had been no lapse. But there there had been no division of funds into compartments, and the original purpose had been over-fulfilled. There was therefore no unsatisfied condition precedent to the use of the funds. An intention to leave any surplus to be used for similar objects could there fairly be assumed, and there had been no express striking out of the possibility.

(Theobald 285.)

Re Hayes [1954] 1 W.L.R. 22
Re Bawden [1954] 1 W.L.R. 33n.; [1953] 2 All E.R. 1235

Hospitals—National Health Service Act, 1946—*extinction or survival.*—In *Re Hayes* the testator made his will in 1938. The residue was divided among twenty-nine named charitable institutions. He directed that the benefits were to be limited to charities still "in existence at his death" and excluded from benefit such as should have amalgamated with other institutions. He clearly did not have the National Health Service in mind, but was thinking of the extinction of the charities in the sense of complete extinction, an amalgamation or taking over usually having the same effect on the original institution by taking away its identity (*Re Rymer* [1895] 1 Ch. 19). In fact the hospitals named all existed and retained their identity though they were now subject to State control. Vaisey J. held that they should receive their bequests.

In *Re Bawden* the position was similar but more complicated. The settlement was executed in 1905. Income was given to hospitals, but there was a clause providing for a gift over if any of the hospitals became amalgamated with or absorbed in other charities. Danckwerts J. held that amalgamation had occurred in the case of the London Hospital, but as the gift over was void for perpetuity and was introduced by a condition subsequent, the hospital could retain the income without interference, the proviso being struck out. The learned judge held that the other hospitals, though they had been assembled in groups for administrative purposes, had not been amalgamated or lost their identity.

(Theobald 285.)

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4. *WILLS*

By A. Kiralfy, Barrister-at-Law

Re Timson [1953] 1 W.L.R. 1361; [1953] 2 All E.R. 1252.

Legacies—provision out of solvent estate—variation of order of application.—In *Re Rowe* [1941] Ch. 343 it had been held that a legacy was solely charged on personal estate and not on real estate, in spite of A. E. A., 1925, s. 34 (3). In that case pecuniary legacies were left, and there was then a devise of all real estate and the residue of personal estate. Vaisey J. in the instant case had a will in very similar form. There was, however, a distinction, for there had been a codicil, which in the event failed to take effect, which directed that all real and personal estate should be sold and all debts and other provisions paid out of the proceeds of the mixed fund. This was treated as evidence that the testatrix did not intend real property to be treated differently from personal property, and as attracting the old rules as to mixed funds. Hence the real property was liable to be applied in raising the pecuniary legacies. Otherwise an injustice might well have been done. It is interesting to see an illustration of the rule that even an ineffective testamentary instrument may be used as an aid to interpretation.

(Theobald 585.)

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5. *PLANNING CASES*

By T. A. Blanco White, of Lincoln's Inn, Barrister-at-Law

Brown v. *Minister of Housing* [1953] 1 W.L.R. 1370; [1953] 2 All E.R. 1385 (Q.B.D.)

Compulsory purchase—service of order.—Notice of a compulsory purchase order under the Acquisition of Land (Authorisation Procedure) Act, 1946, must be served on a "statutory tenant" of the property to be acquired: for though not a "tenant," he is nevertheless an "occupier" of the property within Sched. 1, para. 3 (1) (b) of that Act.

R. v. *Minister of Housing, ex p. London Corporation* [1954] 2 W.L.R. 103; [1954] 1 All E.R. 88 (C.A.)

Purchase notice—jurisdiction—"owner."—The decision of the Divisional Court noted at (1953) 17 Conveyancer 248 has now been reversed by the Court of Appeal, on the particular ground that the freeholders of the land concerned (which was subject to a lease, held below not to be a lease at a rack-rent, to the Corporation of London) were "owners" of the land for the purposes of section 19 of the

Town and Country Planning Act, 1947, and so could serve a purchase notice on the Corporation in respect of it. Whether this is because the definition of "owner" in section 119 of the Act covers such a case, or because the context requires that the definition be ignored, is not clear. What is probably the more important part of the case—the decision that the Minister must, if asked to do so, consider whether or not the purchase notice was properly served—was not argued on appeal.

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6. *LANDLORD AND TENANT*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Deeble v. *Robinson* [1953] 3 W.L.R. 975; [1953] 2 All E.R. 1348

Leasehold Property (Temporary Provisions) Act, 1951—*meaning of shop—milk round—shed used for storage of bottles, etc., but not for selling milk—retail trade or business—not a shop.*—In this case an application was made under Part II of the Leasehold Property (Temporary Provisions) Act, 1951, for a new tenancy in respect of premises used for the storage of spare bottles, a refrigerator and other articles used in connection with a milk round. No milk was actually sold on the premises, the milk being delivered to customers at their houses. The majority of the Court of Appeal held that the premises were not a "shop" within the meaning of the Act. A "shop" is defined by section 20 as meaning "premises occupied wholly for business purposes, and so occupied wholly or mainly for the purposes of a retail trade or business." The majority interpreted this to mean a retail trade or business carried on in the premises in question. Denning L.J., who dissented, held that the expression could not be so limited. Even if it were, he was prepared to hold that the retail trade of selling milk was carried on *in* the premises, since a trade or business does not only consist of the selling function but of ancillary activities also, such as storage, administration, and so on. Fortunately this difficulty will not arise under the new Landlord and Tenant Bill, since the protection given by Part II of it is not confined to "shops."

Re House Property and Investment Co., Ltd. [1953] 3 W.L.R. 1037; [1953] 2 All E.R. 1525

Assignment of lease for value by a solvent company going into voluntary liquidation—claim to have fund set aside to meet future liabilities to landlord under lease—landlord's right to prove in liquidation.—As this decision is rather on the boundary between landlord and tenant and company law it can be dealt with shortly here. Roxburgh J. in a lengthy and painstaking judgment, in which he reviewed the authorities with care, held that in a case where a solvent company, having gone into voluntary liquidation, assigns for value

a beneficial lease, the lessor has no absolute right to have a fund set aside out of the company's assets to meet its liabilities after the assignment for rent and performance of covenants. Such a course is a possible one, but the circumstances in which it would be justifiable are difficult to envisage, and the normal course is for the lessor to lodge a proof in the liquidation for the difference between the market value of the lease with the benefit of the assignor's covenants and its value without the covenants. The right of the lessor to the latter remedy has been clear since *Hardy* v. *Fothergill* (1888) 13 App.Cas. 351. The view that the setting aside a fund is a possible course agrees with interlocutory observations by Lord Hanworth in *James Smith & Sons (Norwood), Ltd.* v. *Goodman* [1936] Ch. 216. A review of the decided cases, however, established that there is no precedent to be found for this course where there has been an assignment for value. Roxburgh J. explained the Scottish case of *Lord Elphinstone* v. *Monkland Iron and Coal Co., Ltd.* (1886) 11 App.Cas. 332, as being based on peculiarities of the Scots law of assignment—"the only thing that was decided in that case was that where there was no assignee liable a fund should be set aside": [1953] 3 W.L.R. at p. 1065.

To order a fund to be set aside where a valuable lease was assigned for value would create a dangerous precedent. Many of the old cases which might suggest a contrary conclusion were distinguishable by reference to the points that there had been no assignment for value and that they were decided where liquidators had no power to disclaim an onerous lease.

(Woodfall, 24th ed., p. 331.)

Drive Yourself Hire Co. (London), Ltd. v. *Strutt* [1953] 3 W.L.R. 1111; [1953] 2 All E.R. 1475

Rent Restrictions Acts—assignment by assignee of subtenancy with consent of tenant but not of superior landlord—covenant in sublease not to assign without consent of tenant or superior landlord—assignee not a lawful subtenant.—The Court of Appeal have reversed the decision of Lynskey J. in this case (annotated in *The Conveyancer* for May–June, 1953, at p. 249). It is unnecessary to repeat the facts here. The Court of Appeal took a broader view than Lynskey J. of the meaning of "lawfully sublet" in section 15 (3) of the 1920 Act. They agreed that section 15 (3) would in a proper case protect the assignee of a subtenancy, and rejected the argument that the protection is confined to the subtenant to whom the premises were originally sublet. They held, however, that in a case where a sublease contained a covenant (inserted as a condition of the licence given to the tenant to sublet) that the sublessee would not assign or sublet without the consent of the *superior* landlord, and the subtenancy was in fact assigned without the superior landlord's consent, the assignee of the subtenancy was not a lawful subtenant within the meaning of section 15 (3). The superior landlord was not a party to the sublease, and Lynskey J. had taken the view that "lawful" meant lawful as between the sublandlord and the assignee of the

subtenancy. The Court of Appeal looked at the matter rather differently. The sublandlord was not entitled to release her right to require the superior landlord's consent. The provision in the sublease requiring such consent had been inserted expressly for the benefit of the superior landlord. Section 15 (3) requires that all the steps by which the subtenancy was created must be lawful; no assignee can invoke it unless both the sublease and its assignment are lawful in relation to the superior landlord.

It may be noted that Denning L.J. put forward as one ground of his decision the view that the breach of a covenant inserted for the benefit of the superior landlord was unlawful, although the superior landlord was not a party to the instrument, as the superior landlord could take the benefit of it by virtue of section 56 of the Law of Property Act, 1925. Denning L.J. took the opportunity of contesting the doctrine, laid down in *Tweddle* v. *Atkinson* (1861) 1 B. & S. 393, and supported (without argument) in *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co., Ltd.* [1915] A.C. 847, that a stranger to a contract cannot sue on it. This, according to Denning L.J., was contrary to the old common law. It is not, however, proposed to discuss these views here, as they go far outside the law of landlord and tenant, and are not essential to the present decision.

(Megarry, 7th ed., p. 411; *Rent Restrictions Guide*, 3rd ed., pp. 85, 89, 106.)

Mason v. *Clarke* [1954] 2 W.L.R. 48; [1954] 1 All E.R. 189

Landlord and tenant—"reservation" of sporting rights—oral grant of rabbiting rights to third party—tenant farmer's right to kill rabbits.—In a letting of pasture fields the landlords had reserved the sporting rights, and had purported to grant the rabbiting rights to a third party by an oral agreement. The tenant had undertaken (subject to the Ground Game Act, 1880) not to shoot or otherwise sport on the land. The landlord and the third party complained of acts by the farmer which were alleged to be in contravention of his obligations and to constitute trespass against their enjoyment of the *profit à prendre*. The interferences by the farmer consisted of gassing rabbits in the hedgerows in agreement with the county agricultural executive committee, ferreting in the hedgerows, and putting out of action snares which might have injured sheep. The Court of Appeal decided in favour of the farmer on a number of grounds: (1) the third party's rabbiting rights, not having been granted by deed, were not binding in law, and as they were evidenced by a receipt which appeared to have been framed with the object of defrauding the revenue, were not enforceable in equity; (2) in any case the farmer was not precluded by the terms of the reservation (which operated as a regrant) of the sporting rights, or of his undertaking, from carrying out reasonable operations required in the interests of good farming, and his alleged interferences came within that category; (3) the farmer's actions so far as the gassing and ferreting were concerned were probably justifiable by reference to the

occupier's "inseparable" concurrent rights under section 1 of the Ground Game Act, 1880.

(Woodfall, 24th ed., p. 804.)

Jones v. *Gates* [1954] 1 W.L.R. 222; [1954] 1 All E.R. 158

Agricultural holdings—notice to quit—"required for a use other than for agriculture"—reg. 4 of the Agriculture (Control of Notices to Quit) Regulations, 1948—jurisdiction of the court.—This is a decision of considerable interest on the security of tenure provisions of the Agricultural Holdings Act, 1948. The landlord of an agricultural holding served a notice to quit on the tenant under section 24 (2) (b) of the Act, on the ground that the land was required for a use, other than for agriculture, for which permission has been granted under the enactments relating to town and country planning. At the time the notice was served the landlord wished to sell the land in question as a sports ground, but he had had no offers and was not then in negotiation with anyone. The Court of Appeal held, affirming the county court judge, that the onus was on the landlord to prove that the land was "required" within the meaning of the paragraph, and that he had not done so, since at the material time he was not even in negotiation with anyone about selling the land for use as a sports ground. The Court of Appeal also held that the court had jurisdiction to determine the matter. Even if regulation 4 of the Agriculture (Control of Notices to Quit) Regulations, 1948, could be held to confer exclusive jurisdiction on an arbitrator as regards a question "arising out of the reason stated in the notice to quit," the point at issue in this case was not such a question. The tenant was challenging the claim that the reason given was a reason at all within section 24 (2); this is different from a question "arising out of the reason."

It will be seen that neither in *Budge* v. *Hicks* [1951] 2 K.B. 335, nor in this case is the precise character of regulation 4 determined, although in both cases the court clearly felt that its wording suggested an option rather than a mandate. It would perhaps have been more satisfactory if the court had decided the case on the broader ground of the non-mandatory character of the regulation than on the ground that the question of the validity of the reason is not a question arising out of the reason. It is by no means obvious that it is not.

(Jackson's *Agricultural Holdings*, 10th ed., p. 137.)

Barrow Green Estate Co. v. *Exors. of Walker, decd.*
[1954] 1 W.L.R. 231; [1954] 1 All E.R. 204

Agricultural holdings—landlord's claim for dilapidations under section 57 (1) of the Agricultural Holdings Act, 1948—relevance of tenancy agreement.—The meaning of section 57 of the Agricultural Holdings Act, 1948, and in particular the relationship between

section 57 (1) and section 57 (3), has already given rise to some litigation. It is to be hoped that if and when the 1948 Act is amended this section will be reconsidered. Some difficulties of interpretation were discussed in *Kent* v. *Conniff* [1953] 1 Q.B. 361. In the present case the question upon which an agricultural arbitrator sought guidance was whether, if a landlord bases his claim on section 57 (1), which does not refer to the tenancy agreement, instead of on section 57 (3), which does, he is entitled or bound to have regard to the agreement. The Court of Appeal held that the arbitrator is bound, when a claim is made under section 57 (1), to have regard (1) to the terms of the tenancy agreement under which the land is held, (2) to the terms of any other agreement affecting the holding which is material, (3) to the provisions of the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948 (S.I. 1948, No. 184) in so far as they are incorporated in the contract of tenancy. There seems to be little doubt that the decision is correct, even if the court faltered a little in dovetailing section 10 (3) with section 11 (3) of the Agriculture Act, 1947. The opposite decision would have produced absurd results.

(Jackson's *Agricultural Holdings*, 10th ed., p. 177.)

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7. *REVENUE CASES*

By Desmond C. Miller, Barrister-at-Law

Income Tax

Lomax v. *Newton* [1953] 1 W.L.R. 1123; [1953] T.R. 283 (Ch.D.)

Statutory provisions: Rule 9 of Schedule E, the Income Tax Act, 1918 (now Rule 7 of Schedule IX, the Income Tax Act, 1952).

Point: The following payments made by an officer of field rank in the Territorial Army, namely for:—

Annual Mess Subscriptions.
Share of Mess Guests' Expenditure.
Batman.
Hire of Camp Furniture.
Tickets for Other Ranks' social functions

were referable to his personal and social obligations rather than to the performance of his official duties, and, as a consequence, could not satisfy the tests laid down by Rule 9, *supra*.

On the other hand, the payment made for hotel accommodation, on attending exercises and conferences, where it was established that the attendance was compulsory and that the appellant had no choice as to the accommodation selected, was admitted as a proper deduction in computing the officer's emoluments for income tax purposes.

Griffiths v. *Mockler* [1953] 1 W.L.R. 1123; [1953] T.R. 287 (Ch.D.)

Statutory provisions: Rule 9 of Schedule E, the Income Tax Act, 1918 (now Rule 7 of Schedule IX, the Income Tax Act, 1952).

Point: Following his decision in *Lomax* v. *Newton, supra*, Vaisey J. allowed the Crown's appeal from the General Commissioners' decision. The Commissioners had held that the annual and monthly mess subscriptions paid by a regular officer, pursuant to King's Regulations, were to be admitted as deductions in computing the emoluments of his employment as a Regular Army Officer.

Strick v. *Longsdon* [1953] T.R. 293 (Ch.D.)

Statutory provisions: Section 15, the Finance Act, 1940 (now section 175, the Income Tax Act, 1952); Rule 2 of Case VI of Schedule D, the Income Tax Act, 1918 (now section 135, the Income Tax Act, 1952).

Point: Apparently the charge under Case VI, upon an excess rent, extends to a year of assessment in which no rent is in fact received.

Facts and Decision: The respondent granted a lease of a farm on December 13, 1947. The rent, which was at the rate of £675 a year, was payable by half-yearly instalments on April 6 and October 11, in each year, but the first payment was not to be made until April 6, 1948.

Notwithstanding the fact, as was admitted, that no rent had been received in the year 1947–48, assessment under section 15 of the Finance Act, 1940, upon the excess rent computed in accordance with that provision, was made for the period ending April 5, 1948. The respondent appealed to the General Commissioners, who discharged the assessment.

Held: (Reversing the General Commissioners' decision) that the respondent was, as respects the year 1947–48, entitled to rent.

Haldin and Phillips, Ltd. v. *C. I. R.* [1953] T.R. 297 (Ch.D.)

Statutory provisions: Section 21, the Finance Act, 1922; section 31 (4), the Finance Act, 1927 (now see I. T. A., 1952, sections 245 and 253, respectively).

Point: For the purposes of section 31 (4), *supra*, accounts are not made up unless made up before the date of the resolution for voluntary liquidation.

British Legion (Peterhead Branch) v. *C. I. R.* [1953] T.R. 305 (Ct. of Sess.)

Statutory provision: Case I of Schedule D, the Income Tax Act, 1918 (now section 123, the Income Tax Act, 1952).

Point: Whether any activity amounts to a trade within the context of the Income Tax Acts is a question of fact, and the motive

of the promoters of any enterprise and the use to which the profit arising therefrom is ultimately put, are not relevant factors in reaching a decision.

Facts and decision: The appellants were registered as a charity under the War Charities Act, 1940, and, with the object of raising funds for the purposes of the charity, organised a series of dances over a period of years. Substantial sums were raised in the result and were, it was admitted, applied for the purposes of the charity. The sole point, therefore, was whether, in conducting these dances, the appellants had engaged in an activity in the nature of trade.

Held: (Affirming the Special Commissioners' decision) that the profits arising from the conduct of the dances were chargeable under Case I of Schedule D.

(The Court of Session indicated, although necessarily by way of *obiter*, that the true chargeable profit could only be determined by a process of discounting which would take into account the gratuitous provision of premises and services.)

Earl Beatty v. *C. I. R.* [1953] 1 W.L.R. 1090; [1953] T.R. 311 (Ch.D.)

Statutory provisions: Section 125, the Income Tax Act, 1918, and section 18, the Finance Act, 1936 (now sections 41 and 413 respectively, the Income Tax Act, 1952).

Point: The word "discover" in section 125, *supra*, is satisfied where the Inspector of Taxes first appreciates the true relevance of the facts before him.

Re Delhi Electric Supply and Traction Co., Ltd. [1953] 3 W.L.R. 1085; [1953] 2 All E.R. 1453 (C.A.)

Statutory provisions: Section 302, the Companies Act, 1948.

Point: The revenue laws of a foreign State will not be enforced, whether directly or indirectly, in the courts of this country. *Re Visser* [1928] Ch. 877, approved.

Facts and decision: The Delhi Electric Supply and Traction Co., incorporated in England, carried on business in India until 1949, when the undertaking was sold to the Government of India. The purchase price was paid in India and remitted by the company to the United Kingdom. Subsequently, the company went into voluntary liquidation, in which the Government of India sought to be admitted to proof for a sum of Indian income tax substantially though not wholly consisting of capital profits tax. The liquidator rejected the proof.

Held: (i) that the word "liabilities" in section 302, *supra*, must be construed so as to exclude claims not enforceable according to the laws and in the courts of the United Kingdom;

(ii) that the courts of this country could not be used as a means of collecting taxes imposed by another State, and for this purpose

no basis existed on which a distinction could be drawn between States adhering to the British Commonwealth and other States;

(iii) the claim of the Government of India could not accordingly be admitted to proof in the liquidation.

Leave to appeal to the House of Lords granted.

Commercial Securities, Ltd. v. *C. I. R.* [1953] T.R. 329 (Ch.D.)

Statutory provisions: Section 20 (6), the Finance Act, 1936 (now section 263 (a), the Income Tax Act, 1952) and section 21 (7), the Finance Act, 1922 (now section 255 (2), the Income Tax Act, 1952).

Point: In the case of investment companies within the scope of sections 245 *et seq.* of the Income Tax Act, 1952, income arising in the liquidation is hypothecated to members as their income for surtax purposes. However this apportionment, and consequential charge of surtax cannot be made unless the member receives, or is entitled to receive, *that income* beneficially.

Facts and Decision: The appellant taxpayer, admittedly an investment company, and moreover one within the scope of the companies surtax provisions (*cf.* section 245, the Income Tax Act, 1952) passed a resolution for voluntary liquidation on April 29, 1949. From that date until February 1, 1950, when the distribution of the assets *in specie* was completed, the liquidator received dividends and interest from the company's investments amounting to £26,404.

The Special Commissioners, by notice in writing addressed to the liquidator on August 22, 1950, directed that in accordance with the provisions of section 20 (6) of the Finance Act, 1936 (for the purposes of assessment to surtax) the actual income from all sources of the company should, from April 29, 1949, to February 1, 1950, be deemed to be the income of the members, and that the amount thereof should be apportioned among the members. Part of this income was apportioned to persons with life interests in settled funds which included shares in the company, and the appeal was made against that apportionment.

The Crown's contention was that although the amount so apportioned was not income for the purposes of the settlement, it must by reason of the statutory provisions above indicated be deemed to be income, and therefore income of the tenants for life, for surtax purposes. The appellants contended that in order to found the liability to surtax, there must be shown to exist an individual who, under the limitations of trust contained in the settlement, was entitled to the amount in question as income; under the law of trusts, so the appellants said, it was plain that this amount did not come to the life tenants as income but had to be treated as capital of the settlement, and therefore belonged to someone other than the life tenants.

Held: (Reversing the Special Commissioners' decision) that the apportionment was bad in law.

Boarland v. *Madras Electric Supply Corpn., Ltd.* [1953] T.R. 421 (C.A.)

Statutory provisions: Rule 11 (2) of the Rules applicable to Cases I and II of Schedule D, the Income Tax Act, 1918 (now section 19, the Finance Act, 1953).

Point: As the word " person " in Rule 11 (2), *supra*, is not limited by its context, it is a word of wide import and includes the Crown.

Leave to appeal to the House of Lords was granted.

Profits Tax

C. I. R. v. *Universal Grinding Wheel Co., Ltd.* [1953] T.R. 401 (C.A.)

Statutory provisions: Finance Act, 1947, s. 36 (1) proviso.

Point: Since the redemption of preference capital is equivalent to a reduction of capital and since the word " applied " in the proviso (to section 36 (1)) bears the same meaning as " paid," the amount so applied is not limited by the amount of the nominal capital redeemed.

Facts and Decision: The Universal Grinding Wheel Co., Ltd. was incorporated with a nominal capital of £600,000, divided into 400,000 5 per cent. cumulative participating preference shares of £1 each, and 400,000 ordinary shares of 10s. each, fully paid.

The Articles of Association, by clause 8, provided that the company at its option might redeem the cumulative preference shares upon, *inter alia*, the following terms:

> " The redemption price of a redeemable preference share shall be the nominal amount of the share plus a premium of 7s. per share."

The company decided to exercise this option and the owners of the preference shares were paid the sum of 27s. in respect of each £1 preference share held; of that sum 20s. was provided by a new issue of shares and 7s., paid in cash from the profits of the company otherwise available for dividend (*cf.* the Companies Act, 1948, s. 58).

The Crown maintained that the premium of 7s. per share paid upon redemption was a distribution for Profits Tax purposes, pursuant to section 36 (1) (a) or (1) (b) of the Finance Act, 1947, since this amount was not applied in reducing the share capital but in redeeming redeemable preference shares, that is to say in effect was not saved by the proviso to section 36 (1) *supra*.

The company, on the other hand, maintained that as to the entirety the 27s. thus expended was applied in reducing share capital and, consequently, while the transaction might be within the provisions of section 36 (1) (a) or (1) (b), it was necessarily saved by the proviso to that section. As a further consequence, there was no distribution for profits tax purposes.

Held, affirming the Special Commissioners' decision and that of Upjohn J. (noted Vol. 17, p. 254) (Hodson L.J. dissenting), that the company could not redeem except on a payment of 27s. per share to the holder of each preference share, and in paying that amount,

the company was applying it in the redemption of each such preference share, and, *ex hypothesi*, in reducing the share capital of the company.

The sum so paid was not, therefore, a distribution for Profits Tax purposes.

Leave to appeal to the House of Lords was granted.

Estate Duty

Walker's Trustees v. *Lord Advocate*. *Haldane's Trustees* v. *Lord Advocate* [1953] T.R. 349 (Ct. of Sess.)

Statutory provisions: Section 2, the Married Women's Policies of Assurance (Scotland) Act, 1880; section 4, the Finance Act, 1894.

Point: The statutory trust protects interests of the wife and/or child of the assured only: *Sharp's Trustees* v. *Lord Advocate*, 1951 S.C. 442 applied. A nomination in favour (in certain events) of the estate of a child of the assured does not therefore create a statutory trust under section 2, *supra*, and in the absence of such trust, the assured is not excluded from the possibility of benefit.

Facts and Decision: Policies under the Married Women's Policies of Assurance (Scotland) Act, 1880, were taken out by a parent and, in one typical instance, the nomination was as follows:—

> "This policy and the assurance hereby made is and shall be under the Married Women's Policies of Assurance (Scotland) Act, 1880, for the benefit of the assured's son, Barclay Clibborn Walker, if he shall be alive on the happening of the event assured against but if he shall not then be alive then for the benefit in equal shares of the assured's son and daughter, David Harry Walker and Mrs. Huldah Elizabeth Christina Rennie if they shall survive the event assured against and if only one of the said son and daughter shall so survive then wholly for the benefit of that one and if the assured's said three children shall all predecease the happening of the event assured against, then for the benefit of the estate of the last to die of the said three children."

The question was whether, on the death of the parent, the amount payable under such a policy of insurance was aggregable with the remainder of his estate for the purpose of computing the rate of duty applicable.

It was conceded that the provision of the policy for the benefit of the estate of the child last to die conferred a right of disposition by will on that child, with the necessary corollary that the property would pass on his intestacy if he were to leave no will.

In these circumstances, the Inland Revenue contended that the assured could not claim the benefit of section 4 of the Finance Act, 1894, *supra*, since in certain circumstances, *i.e.*, if he were to survive all children named by the nomination (in the policy) he had or could procure for himself an interest in that policy.

Held (Lord Mackay dissenting):—

(i) Should the last survivor of the children named die intestate in the lifetime of the assured, the trust would be a trust for the benefit of that child's heirs.

(ii) Such heirs were not the object of a statutory trust under section 2 of the Act of 1880, *supra,* and the privilege of irrevocability conferred by that Act would thereupon cease to be effective.

(iii) In such event, the trust would become revocable by the assured, who would be entitled to resettle the policies as he saw fit.

(iv) The moneys payable under the policy were not therefore property in which the deceased (the assured) never had an interest and, as a consequence, were aggregable with the remainder of his estate.

Holt & Others v. *C. I. R.* [1953] 2 All E.R. 1499; [1953] T.R. 373 (Ch.D.)

Statutory provisions: Section 7 (5), the Finance Act, 1894.

Point: Notwithstanding the existence of pre-emptive rights, section 7 (5), *supra,* requires that a market in such shares is to be assumed, from which no buyer is excluded: *C. I. R.* v. *Crossman, Mann* [1937] A.C. 26 applied. However, since the hypothetical purchaser of a minority shareholding in such a company would be unable to market his shares freely, and further would be unable, in all probability, to influence the company's dividend policy, he must be assumed to be an exceptional investor who had some special reason for making an investment in shares of this kind. Such an investor would not rush hurriedly into the transaction, but considering carefully the prudence of the course would seek the fullest information as to the company's past history, its prospects and its trade.

Facts and Decision: By voluntary settlement, dated January 7, 1947, Mr. Robert Longstaff Holt settled 43,698 ordinary shares of £1 each in John Holt & Co. (Liverpool), Ltd. Mr. Holt died on March 11, 1948, with the result that estate duty became payable under section 2 (1) (c) of the Finance Act, 1894, on the principal value of the shares thus settled.

The Commissioners of Inland Revenue first claimed a value of £3 per £1 share, but subsequently made a formal determination under section 10 of the Finance Act, 1894, in the value of 34s. per share. The appeal was brought by way of petition under section 10, *supra,* by the Trustees of the Settlement. At the date of settlement and again at the date of death of Mr. Robert Holt, the capital of John Holt & Co. (Liverpool), Ltd. was £1,150,000 divided into 150,000 Preference shares and 1,000,000 Ordinary shares of £1 each, of which 139,140 Preference shares and 697,680 Ordinary shares were issued. The shares comprised in the settlement therefore formed a minority holding.

The Articles of Association of the company contained extensive restrictions on the transfer of its shares, and in fact all the issued share capital was held by members of the Holt family or by trustees of Holt Family Trusts. There was evidence that the Holt family desired and intended to retain the Ordinary shares and the control of the company which they carried. The shares were not quoted on the Stock Exchange.

The values above indicated were urged by the Commissioners who additionally indicated during the hearing that they would be prepared to agree a value of 25s. per £1 share. For the trustees, the figure originally put forward was 11s. 3d. per share, but that was amended in the petition and at the hearing to a figure of 17s. 2d. per share.

In a hearing which lasted for eleven days, both parties called a number of expert witnesses. Those for the trustees included business men of experience and standing in the sphere with which the company's trade was concerned, chartered accountants, a merchant banker, a stockbroker and the chairman of the company. These witnesses dealt with the history of the company's trade since its inception, the policies of the board, particularly in relation to dividends and reserves throughout that history, the factors affecting the company's trade and its future prospects and finally with the position disclosed by the company's accounts at the date of the death in question, with particular reference to the liquid condition (or the reverse) of the company's assets.

The Crown's witnesses included three chartered accountants of considerable experience, and one stockbroker, and it is a matter of importance to note that the one feature common to the three accountants' evidence was that each (apparently) considered that the main factor which would affect the prospective purchaser's bid for these shares was the rate of dividend which he might expect to receive.

Danckwerts J., having considered the evidence and the factors which he indicated would have influenced this "exceptional kind of investor," arrived at a figure of 19s. per share.

Stamp Duty

Platts Trustees v. *C. I. R.* [1953] T.R. 289 (C.A.)

Statutory provisions: Sections 13 and 54, the Stamp Act, 1891; section 74, the Finance (1909–10) Act, 1910.

Point: A deed of surrender and release of a life interest which has the effect of accelerating or bringing into operation interests which but for its execution would not have existed, is a disposition which attracts a duty as a conveyance on sale by force of section 74 of the Finance (1909–10) Act, 1910.

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8. *MISCELLANEOUS*

Wooldridge v. *Stanley Hicks & Son* [1953] C.P.L. 700

Negligent statement—surveyors instructed by mortgagees—liability to mortgagor.—It is well settled that where a surveyor or other person makes a report to a prospective borrower he is under no liability in respect of negligent statements in the report to a lender

who relies on the report (*Le Lievre* v. *Gould* [1893] 1 Q.B. 491; *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164). The plaintiff who relies on the report can only succeed if he can show fraud or that there was a contract or fiduciary relationship between him and the defendant. In the instant case the plaintiff was considering buying a furnished house and borrowing part of the purchase money from a bank. The bank instructed the defendants to make a survey of the property. There was a postscript to the instructions containing an express request from the plaintiff to pay particular attention to dry rot and woodworm. The purchase was duly completed and it was then discovered that there was a bulge in one of the walls and that dry rot was present. The plaintiff claimed damages for negligence. Ormerod J. held that, so far as the bulge in the wall was concerned, the plaintiff was not entitled to recover; in making the survey for the purposes of the mortgage there was no contractual relationship between the plaintiff and defendants. The matters dealt with in the postscript were extraneous to the survey for the purposes of the mortgage and in respect of those matters the defendants were acting for the plaintiff and not the bank, and the plaintiff was entitled to damages. From the very short report it would appear that the plaintiff succeeded in contract, and not in tort, but it is a little difficult to see what consideration moved from the plaintiff to the defendants and most persons would be surprised to hear that a more or less casual request in a postscript had the result of making the person actuating the request a party to the contract.

China v. *Harrow U. D. C.* [1953] 3 W.L.R. 885

Arrears of rates—Limitation Act, 1939.—In *Re McGreavy* [1950] Ch. 150 the local authority established the right to petition in bankruptcy against a defaulting ratepayer. The debtor there unsuccessfully argued that liability for rates was not a "debt" as the only remedy of a local authority to recover rates is by way of distress. In the instant case, it was the local authority which was trying to argue that liability for rates differed from liability for other debts so that the liability did not become barred by lapse of time. It was well settled before 1939 that there was no period of limitation barring the right of the local authority to recover rates. The Divisional Court held that the Act of 1939 has changed the law, and that the ordinary six-year period applies as much to liability for rates as to simple contract debts. Procedure by way of distress in the case of rates is an "action to recover any sum of money recoverable by virtue of any enactment." By section 31 of the 1939 Act "action" includes any proceeding in a court of law and it is well settled that justices, when issuing a distress warrant for the recovery of rates, act judicially: *Potts* v. *Hickman* [1941] A.C. 212. In particular, the local authority has to prove a demand for rates and a subsequent default. The period of six years runs from the demand.